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California's Fair Employment and Housing Act: A Viable State Remedy For Employment Discrimination

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Fair employment laws, which originated in this country in 1941 when President Franklin D. Roosevelt issued an executive proclamation prohibiting race discrimination in government defense contracts,[1] have increased in scope substantially over the years. The California Fair Employment Practices Act was passed in 1959,[2] and was followed five years later by title VII of the Civil Rights Act of 1964,[3] the major federal prohibition against employment discrimination. While litigation under the federal Act was vigorous, for many years California's Act was largely ignored or ineffectual. Procedural and substantive amendments to the state Act in the 1970's, however, gave this law new vigor, and it has now become a powerful and effective tool for eliminating employment discrimination in California on the basis of race, national origin, religion, sex, age, physical handicap, medical condition, and marital status.

Currently, the California Fair Employment and Housing Act

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1. Exec. Order No. 8802, 6 Fed. Reg. 3109 (1941). Promulgated under threat of a great civil rights march in Washington, D.C., this order prohibited race discrimination in government and defense contracts.

2. 1959 Cal. Stat. ch. 121 (originally codified at CAL. LAB. CODE §§ 1410-1433 (West 1971)). The Act has been amended many times. *See* CAL. LAB. CODE §§ 1410-1433 (West Supp. 1983). It is currently entitled the Fair Employment and Housing Act and is codified at CAL. GOV'T CODE §§ 12900-12996 (West 1980 & Supp. 1983).

3. Pub. L. No. 88-352, 78 Stat. 253 (1964) (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1972)).

(FEHA)[4] fills significant gaps that have developed under the federal law. For example, the California law prohibits physical handicap discrimination by most private employers. In contrast, the federal prohibition is generally limited to federal employers, federal grantees, and some federally funded programs. Thus, for many victims of discrimination based on physical handicap, only an action under the state law will be available.[5] Similarly, unlike state provisions, federal law does not directly cover marital status discrimination[6] nor does it require employers to grant pregnancy disability leave to every woman disabled by pregnancy or childbirth.[7] Until recently, litigation in the area of wage discrimination also has been hampered in federal court because of anomalies of the federal law and a complex analytical framework used under title VII. In contrast, California has developed its own unique and straightforward analysis in this area.[8] Finally, the scope of damages, especially for private litigants, is considerably broader under the state law than the federal.[9]

This Article first outlines the history of the California and federal fair employment laws. It then contrasts the substantive coverage of these laws, the applicable administrative procedures, and the relief they make available. The Article next compares federal and state approaches to proving a discrimination case. Finally, the Article focuses on three substantive areas that are given markedly different protection under state and federal laws: comparable worth and compensation discrimination, discrimination based on marital status, and discrimination based on medical condition and physical handicap.[10] After analyzing the dimensions of these legal provisions, the Article concludes that California law often provides broader substantive protection and greater procedural access to individuals who have experienced employment discrimination.

4. CAL. GOV'T CODE §§ 12900-12996 (West 1980 & Supp. 1983) [hereinafter referred to as the Act, the state Act, and the FEHA].

5. *See infra* notes 243-315 & accompanying text.

6. *See infra* notes 205-42 & accompanying text.

7. *See infra* note 36 & accompanying text.

8. *See infra* notes 93-110 & accompanying text.

9. *See infra* note 79 & accompanying text.

10. The authors have chosen to focus their discussion on these areas because the state and federal protections for plaintiffs are significantly different. A thorough discussion of substantive provisions in areas where the state and federal law do not substantially diverge is beyond the scope of this Article.

Background and Procedures

History of Fair Employment Laws in California

When the wartime Fair Employment Practices Committee was disbanded in 1945, its supporters caused fair employment legislation modeled on the committee's procedures to be introduced in five states: California, New York, Pennsylvania, Massachusetts, and New Jersey. The statutes passed in every state but California.[11] Fair employment legislation was also proposed to the voters of California in 1946 as Initiative Measure No. 11, but was defeated by a proportion of over two to one.[12] Similar measures were introduced in the legislature in 1947, 1949, 1951, 1953, 1955, and 1957, failing every time.[13] Finally, in 1959 a bill sponsored by Assemblymen Rumford and Hawkins, co-sponsored by 52 other assemblymen and supported by Governor Edmund G. Brown, was passed by both houses and signed into law on April 16, 1959.[14]

This new law, entitled the Fair Employment Practices Act, estab-

11. 1945 Mass. Acts ch. 117 (currently codified at MASS. GEN. LAWS ANN. ch. 151B, § 1-10 (West 1982)); 1945 N.J. Laws ch. 169, § 1 (currently codified at N.J. REV. STAT. § 10:5-1 (1976)); 1945 N.Y. Laws ch. 118, §§ 1-3 (currently codified at N.Y. EXEC. LAW §§ 290-301 (McKinney 1982)); 1945 Pa. Laws 744 (currently codified at 43 PA. CONS. STAT. §§ 951-963 (1964 & Supp. 1982)). *See* A.B. 11, 31, 97, Cal. Leg., 1st Extraordinary Sess., 1946 Assembly Final History 99, 103, 126. *See also* DEP'T OF FAIR EMPLOYMENT AND HOUSING, FEHC: TWENTIETH ANNIVERSARY (1979) (copy on file at the offices of the Department of Fair Employment and Housing, 1201 I Street, Sacramento, California) [hereinafter cited as FEHC: TWENTIETH ANNIVERSARY]; M. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 9-17 (1966).

12. Initiative 11 was defeated by a vote of 1,682,646 to 675,697. *See* FEHC: TWENTIETH ANNIVERSARY, *supra* note 11. It is interesting to compare the history of the then Fair Employment Practices Act with that of the Rumford Fair Housing Act of 1963, 1963 Cal. Stat. ch. 185. The latter law prohibited discrimination on account of race and national origin in housing. It was overturned by another initiative, Proposition 14, in November 1964. Proposition 14, however, was later ruled unconstitutional by the United States Supreme Court in Reitman v. Mulkey, 387 U.S. 369 (1967) (adopting the reasoning of the California Supreme Court in Reitman v. Mulkey, 64 Cal. 2d 529, 413 P.2d 825, 50 Cal. Rptr. 881 (1966)). The Rumford Fair Housing Act, codified at CAL. HEALTH & SAFETY CODE §§ 35700-35744 (West 1973), was reinstated in 1966, and was joined with the Fair Employment Practices Act in the Governor's Reorg. Plan No. 1, 1980 Stat. ch. 992, to form the current FEHA.

13. S.B. 16, Cal. Leg., Reg. Sess., 1947 Senate Final History 403; A.B. 3027, Cal. Leg., Reg. Sess., 1949 Assembly Final History 854; A.B. 3436, Cal. Leg., Reg. Sess., 1951 Assembly Final History 937; S.B. 1477, Cal. Leg., Reg. Sess., 1951 Senate Final History 403; A.B. 900, 917, 1526, Cal. Leg., Reg. Sess., 1953 Assembly Final History 425, 428, 562; A.B. 971, 1868, Cal. Leg., Reg. Sess., 1955 Assembly Final History 487, 691; S.B. 1765, Cal. Leg., Reg. Sess., 1955 Senate Final History 515; A.B. 7, Cal. Leg., Reg. Sess., 1957 Assembly Final History 307.

14. A.B. 91, 1959 Cal. Stat. ch. 121, at 1999-2005.

lished a five member Fair Employment Practices Commission to be appointed by the Governor[15] and an administrative agency, the Division of Fair Employment Practices, to carry out the policies and dictates of the Commission.[16] The statute established as the public policy of California that:

> [T]he practice of denying employment opportunity and discriminating in the terms of employment for such reasons foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advancement, and substantially and adversely affects the interests of employees, employers, and the public in general.[17]

The Commission was given the power to investigate, hold hearings and issue cease and desist orders.[18] The original act barred employment discrimination on the basis of race, creed, color, national origin, or ancestry.[19]

There were serious political impediments to similar legislation on the national level. It was not until 1963 that a comprehensive civil rights bill, covering accommodations, voting, governmental benefits, and employment, was introduced. The portion of the bill covering employment discrimination, title VII, only passed after numerous amendments stripped the new Equal Employment Opportunity Commission (EEOC) of the power to issue cease and desist orders or go to court.[20] The EEOC could only investigate complaints and issue "right-to-sue" letters for private enforcement of the Act.[21] The federal act did pro-

15. CAL. LAB. CODE § 1414 (West 1971 & Supp. 1983). Originally called the Fair Employment Practices Commission, the Fair Employment and Housing Commission was renamed in 1980 pursuant to the Governor's Reorg. Plan No. 1,1980 Cal. Stat. ch. 992, which abolished the Division of Fair Employment Practices and Fair Employment Practices Commission within the Department of Industrial Relations and replaced them with the Department of Fair Employment and Housing and the Fair Employment and Housing Commission, respectively. *See* CAL. GOV'T CODE § 12903 (West 1980 & Supp. 1983).

16. CAL. LAB. CODE § 1431 (West 1971 & Supp. 1983).

17. *Id.* § 1411.

18. *Id.* § 1426.

19. *Id.* § 1412.

20. The legislative history of title VII is complex. Originally introduced by Congressman Emanual Celler on June 20, 1963, H.R. 7152, 88 Cong., 1st Sess., 109 CONG. REC. 11,252 (1963), the statute ran into serious opposition in the Senate where it was subjected to a 543-hour filibuster by southern Senators before it passed with numerous amendments. For the full legislative history, see EQUAL EMPLOYMENT OPPORTUNITY COMM'N, LEGISLATIVE HISTORY OF TITLES VII AND XI OF THE CIVIL RIGHTS ACT OF 1964 (1965); Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 BROOKLYN L. REV. 62 (1964); Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431 (1966).

21. 42 U.S.C. § 2000e-5(d) (1964). Title VII was amended in 1972 to allow the commission itself to take certain cases to court. Pub. L. No. 92-261, § 4, 86 Stat. 103, 104-07 (1972) (codified at 42 U.S.C. § 2000e-5(f)(1) (1976)). However, neither the EEOC nor the

hibit discrimination on the basis of sex, a provision not included in the 1959 California law.

Substantive Coverage of the FEHA

In 1970, the first substantive amendment to the then Fair Employment Practices Act added sex as a prohibited basis for discrimination.[22] Over the years other amendments have added the following as prohibited bases: age over forty (1972),[23] physical handicap (1973),[24] medical condition (1975),[25] marital status (1976),[26] and pregnancy (1978).[27]

The Act also now prohibits discrimination in employment by employers,[28] labor organizations,[29] employment agencies,[30] and any person who aids or abets another in conduct prohibited by the Act.[31] The term "employer" includes any person regularly employing five or more persons or acting as an agent of an employer (directly or indirectly), the state or any political or civil subdivision thereof,[32] and cities.[33] The

federal courts have the resources to handle a large percentage of commission charges in this manner.

22. 1970 Cal. Stat. ch. 1508, § 2, at 2994.

23. In 1961, the California legislature promulgated a prohibition of discrimination in employment on account of age between 40 and 64. 1961 Cal. Stat. ch. 1623, at 3518 (codified at CAL. UNEMP. INS. CODE § 2072 (West 1971 & Supp. 1983)). Section 2072, enforced by the Department of Human Resources, was repealed in 1972 when it was transferred to the FEPA. 1972 Cal. Stat. ch. 1144, at 211-12 (codified at CAL. LAB. CODE § 1420.1 (West 1971 & Supp. 1983)). Section 1420.1 was amended again in 1977, 1977 Cal. Stat. ch. 851, and 1981, 1981 Cal. Stat. ch. 146. It is now codified at CAL. GOV'T CODE §§ 12941-12942 (West 1980 & Supp. 1983).

24. 1973 Cal. Stat. ch. 1189, § 7, at 2502.

25. 1975 Cal. Stat. ch. 431, § 3, at 923. This section, codified at CAL. GOV'T CODE §§ 12926(f), 12940 (West 1980 & Supp. 1983), prohibits discrimination for a health impairment related to a diagnosis of cancer for which a person has been rehabilitated or cured.

26. 1976 Cal. Stat. ch. 1195, § 5, at 5460.

27. 1978 Cal. Stat. ch. 1321, at 4319-22 (codified at CAL. GOV'T CODE §§ 12943, 12945 (West 1980 & Supp. 1983)).

28. CAL. GOV'T CODE § 12940(a) (West 1980 & Supp. 1983).

29. *Id.* § 12940(b).

30. *Id.* § 12940(d).

31. *Id.* § 12940(g) (West Supp. 1983).

32. *Id.* § 12926(c). Although "the state" is specifically mentioned in the statute, the Department of Fair Employment and Housing and the Fair Employment and Housing Commission have been enjoined from pursuing any actions against any state agency subject to the control of the State Personnel Board. State Personnel Bd. v. Fair Employment and Hous. Comm'n, No. 28026 (Sacramento Super. Ct. Feb. 5, 1980) (order granting preliminary injunction). Although Pacific Legal Found. v. Brown, 29 Cal. 3d 168, 624 P.2d 1215, 172 Cal. Rptr. 487 (1981), would appear to resolve this issue in favor of the Department of Fair Employment and Housing and Fair Employment and Housing Commission and although the appeal in this matter was filed on April 25, 1980, no decision has been rendered by the court of appeal as of the date of this Article.

33. CAL. GOV'T CODE § 12926(c) (West 1980 & Supp. 1983).

Act makes it illegal for any employer to refuse to hire, employ, train, or discharge a protected person or to discriminate in compensation or in terms, conditions or privileges of employment.[34] The scope of protection when age and pregnancy are involved, however, is somewhat different: the portion of the act dealing with age does not mention employee benefits[35] and the pregnancy provision omits hiring.[36]

In contrast, title VII covers employers of fifteen or more persons[37] and does not have a separate provision for aiding and abetting. In the federal system, age is covered not under title VII, but under the Age Discrimination in Employment Act,[38] which covers only employees aged forty to seventy,[39] and is administered by the EEOC.[40] As was mentioned above, title VII does not directly provide protection for those discriminated against on the basis of physical handicap, medical condition or marital status.

Administrative Procedure Under the FEHA

Because the state and federal civil rights agencies have such different histories, structures, and powers, it is not surprising that their administrative procedures differ markedly. From the beginning, the EEOC was denied cease and desist power. Therefore, it never developed an administrative system of due process hearings. Instead, it investigates and attempts to conciliate charges of discrimination. Failing that, a charging party is free to file a charge in federal court which is litigated de novo.[41] In contrast, the California Commission has the power to enjoin illegal acts. Its administrative system includes, in addition to the power to investigate and conciliate charges, the right to hold hearings and render decisions that are enforceable in state court.[42]

In 1978, massive amendments to the then Fair Employment Practices Act and Fair Housing Act expanded the investigative powers available under the Acts. Prior to those amendments, the Fair Employment Practices Commission investigated, conciliated, prosecuted, and

34. *Id.* § 12940(a).

35. *Id.* § 12941.

36. *Id.* § 12945. In addition, the pregnancy provision is not applicable to any employer subject to title VII, except as to section 12945(b)(2), which guarantees all persons disabled by pregnancy, childbirth, or related medical conditions the right to leave during their disability. *Id.* § 12945(e).

37. 42 U.S.C. § 2000e(b) (1976).

38. 29 U.S.C. §§ 621-634 (1976 & Supp. V 1981).

39. *Id.* § 631 (Supp. V 1981).

40. Reorg. Plan No. 1 of 1978, 3 C.F.R. 321 (1978), *reprinted in* 92 Stat. 3781 (1978).

41. 42 U.S.C. § 2000e-5(f)(1) (1976).

42. CAL. GOV'T CODE §§ 12960-12976 (West 1980 & Supp. 1983).

adjudicated charges. The procedure was such that individual Commission members were often able to interfere with investigations according to their whims.[43] The 1977 amendments[44] separated the investigative and prosecutorial functions, which were given to the Division of Fair Employment Practices, from the rulemaking and quasi-judicial functions, which were left with the Commission.[45] Subsequent amendments[46] created the Department of Fair Employment and Housing, which succeeded to the functions of the Division, and also combined the housing and employment code sections to create the Fair Employment and Housing Act as it presently exists.

Today a person who claims that he or she is aggrieved by an alleged unlawful employment practice may file a complaint with the Department of Fair Employment and Housing (DFEH or Department).[47] The Department is empowered to conduct an investigation,[48] which may involve the taking of depositions[49] and the issuance of subpoenas,[50] interrogatories,[51] and requests for production of documents.[52] All of these acts may be enforced by the superior court[53] and the superior court order may be challeged by writ of mandate.[54] If the Department determines that a complaint is valid and the unlawful practice cannot be eliminated by conference, conciliation, or persuasion, it may issue a written accusation that requires a hearing before the Commission.[55] The accusation, the administrative equivalent of a civil complaint, may be issued within one year of the filing of an individual charge, and within two years of the filing of a class charge.[56]

The Department has a great deal of discretion under this scheme.

43. Tobriner, *The California Fair Employment Practices Commission — The Frustration of Potential*, 10 U.S.F.L. REV. 37, 54 (1975).

44. 1977 Cal. Stat. ch. 1188.

45. *Compare* CAL. GOV'T CODE § 12930 (West 1980 & Supp. 1983) (functions of the Division) *with* CAL. GOV'T CODE § 12935 (West 1980 & Supp. 1983) (functions of the Commission).

46. CAL. GOV'T CODE § 12903 (West 1980 & Supp. 1983).

47. *Id.* § 12960.

48. *Id.* § 12963.

49. *Id.* § 12963.3.

50. *Id.* § 12963.1(c).

51. *Id.* § 12963.2.

52. *Id.* § 12963.4.

53. *Id.* § 12963.5(a)-(c).

54. *Id.* § 12963.5(d).

55. *Id.* § 12965.

56. *Id.* § 12965(a).

It may determine the scope and extent of the investigation,[57] as well as whether there is time for a meaningful conciliation conference.[58] As a practical matter, however, the Department seeks informal resolution at every stage of its investigation.[59]

In contrast, the EEOC, which historically has not been able to fully investigate all the charges filed before it, has developed two distinct investigative techniques. The first is similar to that employed by the DFEH. The EEOC has the power to subpoena documents and witnesses,[60] although normally investigations are conducted with the voluntary cooperation of all parties. The EEOC, like the Department, seeks settlement at all stages but only conducts a formal conciliation conference after a probable cause "determination."[61] If it is determined that there is no probable cause to believe a charge is true, it can be dismissed.[62] If there is probable cause to believe a charge is true, the EEOC attempts voluntary compliance through conciliation.[63] In both circumstances the EEOC may issue a right-to-sue letter to the complainant.[64]

The second investigative technique used by the EEOC is the "fact-finding conference," which is conducted after the parties have complied with preliminary requests for information.[65] Parties and witnesses may be subpoenaed for such a conference[66] but participation is usually vol-

57. Mahdavi v. Department of Fair Employment Practices, 67 Cal. App. 3d 326, 337, 136 Cal. Rptr. 421, 426 (1977).

58. Motors Ins. Co. v. Department of Fair Employment & Hous., 118 Cal. App. 3d 209, 224, 173 Cal. Rptr. 332, 341 (1981).

59. *See* CAL. CONTINUING EDUC. OF THE BAR, ADVISING CALIFORNIA EMPLOYERS § 2.90-2.115 (1981) (describing the DFEH procedure generally) [hereinafter cited as ADVISING CALIFORNIA EMPLOYERS].

60. 42 U.S.C. §§ 2000e-8 to -9 (1976).

61. ADVISING CALIFORNIA EMPLOYERS, *supra* note 59, § 2.80.

62. EEOC Regulations, 29 C.F.R. § 1601.19 (1982).

63. *Id.* § 1601.24. Beginning on June 20, 1968, the EEOC began releasing for publication certain of the EEOC's probable-cause determination decisions (with the names of parties deleted). These are published in the Bureau of National Affairs' Labor Relations Reporter and the Commerce Clearing House's Employment Practices Guide. They are informational and not binding on the EEOC or the courts.

64. *Id.* § 1601.28. This letter gives the charging party the right to file an action under title VII within 90 days, and is issued in those frequent cases in which the EEOC itself does not pursue the matter in court. By contrast, California law requires that the Department of Fair Employment Practices issue a right-to-sue letter to all complainants — whether or not the investigation is completed — if no accusation has issued within 150 days after the complaint was filed, or sooner if the department decides to close the case. CAL. GOV'T CODE § 12965(b) (West 1980). Further, the state right-to-sue authorization gives the complainant one year to file in court. *Id.*

65. ADVISING CALIFORNIA EMPLOYERS, *supra* note 59, § 2.61.

66. 29 C.F.R. § 1601.16 (1982).

untary. Settlement is strongly encouraged at these conferences. If no settlement occurs, the case can be closed or investigation can continue, although settlement or dismissal is the usual outcome. Once a final decision is made, the private party is given a right-to-sue letter and can continue to pursue the matter in federal court.[67]

Under the FEHA, on the other hand, if the Department finds probable cause to believe the Act has been violated, and the case is not settled, an accusation is issued, and the case moves to the jurisdiction of the Commission which holds hearings pursuant to the Administrative Procedure Act (APA).[68] The accusation initiates the process and states in ordinary language the acts or omissions charged and the statutes allegedly violated.[69] The FEHA requires that hearings take place not more than ninety days after the issuance of the accusation.[70]

The actual hearing is conducted according to the rules of the APA, and presided over by an administrative law judge (ALJ).[71] The Commission determines whether the case will be heard by the ALJ alone or in conjunction with the Commission.[72] When the case is heard by the ALJ alone, he or she must issue a decision within thirty days after the case is submitted.[73] The Commission then has the opportunity to review the ALJ's decision and adopt it when appropriate within one hundred days or refer it to the ALJ to take additional evidence.[74] Alternatively, the Commission may request further argument from the parties and issue its own decision.[75]

The Commission's opinion may govern only the case before it or may be designated as precedential in interpreting and applying the pro-

67. *See supra* note 64.

68. CAL. GOV'T CODE § 12972 (West 1980) (providing that hearings be held pursuant to the Administrative Procdure Act, CAL. GOV'T CODE §§ 11500-11529 (West 1980 & Supp. 1983)). There is no comparable provision under title VII regarding private, state, and local government employers.

69. *Id.* §§ 11503, 12965(a).

70. *Id.* § 12968. A party may be granted a continuance upon a showing of good cause. *Id.* § 11524. It should be noted that the Office of Administrative Hearings has a strong anti-continuance policy. *See* ADVISING CALIFORNIA EMPLOYERS, *supra* note 59, § 2.103, at 135.

71. CAL. GOV'T CODE § 11512(a) (West 1980).

72. *Id.*

73. *Id.* § 11517(b).

74. *Id.* § 11517(d). The Commission may adopt the ALJ's decision only when it determines that the evidence supports the findings and the findings support the conclusions. Topanga Ass'n for Scenic Community v. County of Los Angeles, 11 Cal. 3d 506, 515, 522 P.2d 12, 17, 113 Cal. Rptr. 836, 841 (1974) (specifically holding that a decision must "set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order").

75. CAL. GOV'T CODE § 11517(c)-(d) (West 1980).

visions of the Act.[76] Since 1977, when it was given the power to issue precedential decisions, the Commission has published fifty-nine such decisions.[77]

The state Commission's discretion in awarding relief is exceedingly broad. It can issue cease and desist orders of any kind, order hiring, reinstatement, promotion, and order back pay.[78] In addition,

76. *Id.* § 12935(h) (West 1980 & Supp. 1983). As originally promulgated this section did not expressly authorize precedent decisions in the area of housing, although the commission believed it had that authority and issued five such decisions. In 1981, the Act was amended to authorize precedential decisions as to all provisions of the FEHA. 1981 Cal. Stat. ch. 625.

77. These decision are published by the Continuing Education of the Bar in Berkeley, California under the title Fair Employment and Housing Commission Precedential Decisons, and are available in looseleaf notebooks. Of the 59 precedent decisions issued to date, three concerned procedural matters only: DFEP v. General Motors Corp., FEHC Dec. No. 79-A (1979); DFEP v. Motors Ins. Co., FEHC Dec. No. 79-B (1979), *aff'd*, 118 Cal. App. 3d 209, 179 Cal. Rptr. 332 (1981); DFEP v. 20th Century Ins. Co., FEHC Dec. No. 79-C (1979). These cases confirmed the department's broad powers with regard to investigation and conciliation. *See supra* text accompanying note 58. Seven cases involved housing discrimination: DFEH v. Gwen Bar, Inc., FEHC Dec. No. 83-18 (1983); DFEH v. Atlantic North Apartments, FEHC Dec. No. 83-12 (1983); DFEP v. Neugebauer, FEHC Dec. No. 80-14 (1980); DFEH v. Somekh, FEHC Dec. No. 80-15 (1980); DFEH v. Hess, FEHC Dec No.80-10 (1980), *aff'd*, 138 Cal. App. 3d 232, 187 Cal. Rptr. 712 (1982); DFEH v. Terven, FEHC Dec. No. 80-09 (1980); DFEP v. Anderson, FEHC Dec. No. 79-05 (1979).

Fifty-one of the decisions involved employment discrimination. Of these, thirteen concerned physical handicap: DFEH v. Sacramento Personnel Dep't, FEHC Dec. No. 83-20 (1983); DFEH v. City of Anaheim Police Dep't, FEHC Dec. No. 82-08 (1982); DFEH v. Bay Area Rapid Transit Dist., FEHC Dec. No. 80-21 (1980); DFEH v. Bay Area Rapid Transit Dist., Order on Reconsideration, FEHC Dec. No. 80-21 (1980); DFEP v. Ametek, Pacific Extrusion Division, FEHC Dec. No. 80-11 (1980); DFEH v. Southern Pacific Transp. Co., FEHC Dec. No. 80-33 (1980); DFEP v. Interstate Brands Corp., FEHC Dec. No. 78-05 (1979); DFEP v. City of Modesto, FEHC Dec. No. 79-05 (1979), *appeal pending*; DFEH v. El Dorado County Sheriff's Dep't, FEHC Dec. No. 79-06 (1979); DFEH v. City of Whittier, FEHC Dec. No. 79-15 (1979), *appeal pending*; *In re* Accusation of Sterling Transit Co., FEHC Dec. No. 79-04 (1979), *aff'd*, 121 Cal. App. 3d 791, 175 Cal. Rptr. 548 (1981); DFEP v. American Nat'l Ins. Co., FEHC Dec. No. 78-02 (1978), *aff'd*, 32 Cal. 3d 603, 651 P.2d 1151, 186 Cal. Rptr. 345 (1982). Four involved retaliation: DFEH v. City of Vista, FEHC Dec. No. 83-03 (1983); DFEH v. Northrup Serv. Inc., FEHC Dec. No. 83-11 (1983); DFEH v. Rayne Water Conditioning, FEHC Dec. No. 82-03 (1982); DFEH v. Rah Indus., FEHC Dec. No. 80-12 (1980). Two involved age: DFEH v. United Airlines, Inc., FEHC Dec. No. 82-05 (1982); DFEH v. Xerox Corp., FEHC Dec. No. 80-26 (1980). Two involved religion: DFEH v. District Lodge 120, Int'l Ass'n of Machinists & Aerospace Workers, FEHC Dec. No. 81-07 (1981); DFEH v. Union School Dist., FEHC Dec. No. 80-32 (1980). Two involved marital status: DFEH v. City of Simi Valley, FEHC Dec. No. 83-21 (1983); DFEH v. Boy Scouts of America, FEHC Dec. No. 81-15 (1981). *See infra* notes 205-42 & accompanying text. One involved discrimination on account of pregnancy: DFEH v. Travel Express, FEHC Dec. No. 83-17 (1983). The remaining cases involved race, sex and national origin discrimination in hiring, promotion, termination and terms and conditions.

78. CAL. GOV'T CODE § 12970(a) (West 1980). Section 12970(a) reads as follows:

> If the commission finds that a respondent has engaged in any unlawful practice under this part, it shall state its findings of fact and determination and shall issue

the Commission has interpreted the statute to provide that it has the authority to award compensatory and punitive damages.[79]

As was pointed out above, the EEOC has no cease and desist power or any power to award back pay or any other relief. Also in contrast to the state Act, title VII is enforced strictly through the federal courts, and the federal court's authority to award compensatory and punitive damages under title VII has been strictly limited,[80] although such damages are sometimes awarded under other federal civil rights statutes.[81]

Once the state Commission order has issued it may be reviewed by means of a petition for an administrative writ of mandate.[82] If an employer, labor union, or employment agency petitions for a writ, the Commission decision is reviewed by the superior court under the sub-

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and cause to be served on the parties an order requiring such respondent to cease and desist from such unlawful practice and to take such action, including, but not limited to, hiring, reinstatement or upgrading of employees, with or without back pay, restoration to membership in any respondent labor organization, as, in the judgment of the commission, will effectuate the purposes of this part and including a requirement for report of the manner of compliance.

79. CAL. ADMIN. CODE tit. 2, R. 7286.9(c) (1982). *See* DFEH v. Ambylou Enter., Inc., FEHC Dec. No. 82-06 (1982). This power has been contested. Recently, the California Supreme Court held that compensatory and punitive damages could be awarded by the Superior Court in a private action under the FEHA, but expressly reserved the issue whether such damages may be awarded by the Commission. Commodore Home Sys. v. Superior Court, 32 Cal. 3d 211, 215, 649 P.2d 912, 914, 185 Cal. Rptr. 270, 272 (1982).

80. 42 U.S.C. § 2000e-5(g) (1976) provides in relevant part:

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate.

Cases limiting this language only to back pay awards include Pearson v. Western Elec. Co., 542 F.2d 1150, 1151 (10th Cir. 1976); EEOC v. Detroit Edison, 515 F.2d 301, 308-10 (6th Cir. 1975).

81. The United States Supreme Court has held that "[a]n individual who establishes a cause of action under § 1981 is entitled to both equitable and legal relief, including compensatory and, under certain circumstances, punitive damages." Johnson v. Railway Express Agency, 421 U.S. 454, 460 (1975) (a case brought under 42 U.S.C. § 1981). Punitive damages are not usually awarded under the Age Discrimination in Employment Act (ADEA) because that Act itself provides for liquidated damages for willful violations. 29 U.S.C. § 616(b) (1976 & Supp. V 1981). Compensatory damages have also been denied under the ADEA as contrary to congressional intent. *See, e.g.*, Slatin v. Stanford Research Inst., 590 F.2d 1292, 1296 (4th Cir. 1979); Rogers v. Exxon Research & Eng'g Co., 550 F.2d 834, 841 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978).

82. CAL. CIV. PROC. CODE § 1094.5 (West 1980 & Supp. 1983).

stantial evidence test: is there substantial evidence in light of the whole record to support the Commission's findings?[83] If the petition is filed by a complainant, the courts have applied the independent judgment test: is the conclusion of the Commission supported by the weight of the evidence?[84] This more stringent test is justified because the alleged victim of discrimination has a fundamental and vested interest in employment opportunities free from unlawful discrimination, while employers and unions have no fundamental and vested right to operate free from government regulation.[85]

The FEHA also permits a private right of action. Once the Department has determined that it will not pursue the matter further, or if it has not issued an accusation within 150 days, it must issue a right-to-sue letter to the complainant.[86] The Department will close a complaint upon written request of the complainant if he or she represents that the matter will be pursued in court.[87] If an action is filed in superior court under the FEHA, the plaintiff may seek, in addition to any equitable relief, compensatory and punitive damages[88] and attorneys fees.[89]

The foregoing analysis may give the impression that the state and federal systems overlap. Title VII itself, however, provides for mechanisms that avoid this possibility and allow the two systems to complement each other. At the time title VII was passed many states had fair

83. American Nat'l Ins. Co. v. FEHC, 32 Cal. 3d 603, 607, 651 P.2d 1151, 1153, 186 Cal. Rptr. 345, 347 (1982); Northern Inyo Hosp. v. FEPC, 38 Cal. App. 3d 14, 23, 112 Cal. Rptr. 872, 878 (1974).

84. Kerrigan v. FEPC, 91 Cal. App. 3d 43, 154 Cal. Rptr. 29 (1979).

85. *Id.* at 49-52, 154 Cal. Rptr. at 34-36.

86. CAL. GOV'T CODE § 12965(b) (West 1980).

87. *See* DEPARTMENT DIRECTIVE 06 (Jan. 18, 1982). Some respondents have asserted that a private right of action cannot be pursued before 150 days have passed, but this argument has not been accepted by most courts to which it is addressed. Because the investigation process described above and in ADVISING CALIFORNIA EMPLOYERS, *supra* note 59, takes time, and because the Department, as a matter of sound administrative policy, handles employment cases on a first-in-first-out basis, it is virtually impossible for an accusation to issue in an employment case before 150 days have passed. Furthermore, because of the incredible volume of cases handled by the Department—8,105 in fiscal year 1982—it would be a waste of resources to investigate a case the Department knows will be pursued in court. It is, therefore, the policy not to proceed on any case which will be pursued elsewhere. This decision is clearly within the Department's discretion. *See e.g.*, Motors Ins. Co. v. FEPC, 118 Cal. App. 3d 209, 179 Cal. Rptr. 332 (1981); Mahdavi v. FEPC, 67 Cal. App. 3d 326, 136 Cal. Rptr. 421 (1977). It further accords with a similar procedure under title VII. EEOC Regulations, 29 C.F.R. § 1601.28 (1982). In Commodore Home Sys. v. Superior Court, 32 Cal. 3d 211, 218 n.8, 649 P.2d 912, 916 n.8, 185 Cal. Rptr. 270, 274 n.8 (1982), the California Supreme Court mentioned this practice but declined to comment on its propriety.

88. *See* Commodore Home Sys. v. Superior Court, 32 Cal. 3d 211, 649 P.2d 912, 185 Cal. Rptr. 270 (1982).

89. CAL. GOV'T CODE § 12965(b) (West 1980).

employment practices commissions and the federal Act provided that charges could be filed with the EEOC only after deferral to the state civil rights system.[90] In addition, the federal Act provides that the EEOC must give substantial weight to the final findings and orders of the state agency.[91] The EEOC has entered worksharing agreements with state and local civil rights agencies, including California's DFEH. These agreements allocate the power to investigate and determine probable cause of claims covered by both title VII and state law to the agency with which the claim was initially filed.[92]

The California Commission's Approach to Employment Discrimination Cases

The Commission's approach to determining whether there is discrimination in employment is more comprehensive and flexible than the approach enunciated to date by the United States Supreme Court in its rulings on title VII matters. While the federal system has a rigid structure of presumptions and shifting burdens of going forward with evidence, the Commission tends to ignore such formalities and instead focuses on the evidence as a whole.

Under title VII there are two primary theories used for proving

90. Section 706 of the Civil Rights Act of 1964 provides:

> In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated . . . .

42 U.S.C. § 2000e-5(c) (1976).

91. *Id.* § 2000e-5(b).

92. The state agencies which fit the definition in title VII set forth *supra* note 90 are referred to as "706 agencies." The California Department of Fair Employment and Housing has been designated a 706 agency. *See* EEOC Regulations, 29 C.F.R. § 1601.74 (1982). Worksharing agreements have been entered into with most 706 agencies in order to permit allocation of charges and avoidance of duplication of effort and unnecessary paper work. The agreement with the DFEH provides, in relevant part, as follows:

> 1. DFEH waives the 60 day deferral period referred to in 42 U.S.C. § 2000e-5(c) as to charges alleging employment discrimination covered by both the FEHA and Title VII filed initially with the EEOC.
>
> 2. EEOC delegates DFEH to investigate and resolve charges alleging employment discrimination covered by both the FEHA and title VII filed initially with DFEH, and agrees to accord substantial weight to the final findings, orders, and settlements of the DFEH.

1981 Worksharing Agreement Between the California DFEH and the EEOC.

discrimination. The first, disparate treatment, was defined by the United States Supreme Court in *International Brotherhood of Teamsters v. United States*[93] as follows:

> "Disparate treatment . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. [Citation omitted] Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII.[94]

Thus, in the federal courts, the plaintiff must prove discriminatory intent to prove a disparate treatment case.

The second theory, disparate impact, is wholly court-developed. This theory allows a claimant to challenge employment practices that are facially neutral, such as aptitude tests or height and weight requirements. If such a facially neutral criterion falls more harshly on one group than another and cannot be justified by business necessity, it is illegal under title VII.[95] The Supreme Court has clearly established that intent need not be proved under this theory.[96]

Analysis of disparate treatment cases under title VII is usually made with reference to an allocation of proof set forth in a series of Supreme Court decisions beginning with *McDonnell Douglas Corp. v. Green.*[97] The cases provide generally that the plaintiff's initial burden is to show that he or she belonged to a protected group, applied for an unfilled position, was qualified, was rejected, and that the employer continued to seek applicants with plaintiff's qualifications.[98] This

93. 431 U.S. 324 (1977).

94. *Id.* at 335-36 n.15.

95. This theory was established in Griggs v. Duke Power Co., 401 U.S. 424 (1971). In that case an employer was requiring a high-school diploma or a minimum score on an intelligence test for blue-collar jobs. These requirements screened out almost all black applicants and were found to be unrelated to successful job performance.

96. *Id.* at 432. The Court expressly found that a lack of discriminatory intent was suggested by the employer's special efforts to help undereducated employees by financing two-thirds of the cost of tuition for high school training. The Court stated "Congress directed the thrust of [title VII] to the *consequences* of employment practices, not simply the motivation." *Id.* (emphasis in original).

97. 411 U.S. 792 (1973).

98. The Court stated:

> The plaintiff must show: (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. at 802. The Court noted that this standard is flexible and necessarily varies with different fact situations. *Id.* at 802 n.13.

showing contitutes a prima facie case.[99] If the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to "clearly set forth, through the introduction of admissible evidence the reasons for the plaintiff's rejection."[100] If the defendant meets this burden, the plaintiff, who retains the burden of persuasion throughout, must show either that "a discriminatory reason more likely motivated the employer or . . . that the employer's proferred explanation is unworthy of credence."[101]

The Commission adopted the federal disparate impact analysis[102] but uses a different approach in disparate treatment cases. The Commission, in *DFEH v. Ambylou Enterprises, Inc.*,[103] set forth a different way of stating the disparate treatment theory.

> "In order to prove a violation of the California Fair Employment and Housing Act . . . the Department must first prove by a preponderance of the evidence (1) that the complainant is within the group of people for whose benefit the statute was enacted; (2) that the com-

99. *Id.* at 802. In a later case, Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978), the Supreme Court explained the reasoning behind the elements of a prima facie case set forth in *McDonnell Douglas*. The *Furnco* Court stated:

> [W]e know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible factor such as race.

Id. at 577.

100. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 (1981).

101. *Id.* at 256 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-05 (1973)). This burden allocation was reaffirmed in United States Postal Serv. v. Aikens, 103 S. Ct. 1478 (1983).

102. DFEH v. City and County of San Francisco, FEHC Dec. No. 82-11 (1982). Although the commission adopted the analysis of disparate impact set forth in Griggs v. Duke Power, 401 U.S. 424 (1970), it has taken an approach to statistical proof different from that developed under title VII. Several recent federal cases have established the principle that in discrimination cases, adverse impact can only be proven by statistics showing at least two to three standard deviations from the expected norm. *See* Hazelwood School Dist. v. United States, 433 U.S. 299, 308-09 n.14 (1977); Castenada v. Portida, 430 U.S. 482, 496 n.17 (1976). In *DFEH v. City and County of San Francisco*, on the other hand, the Fair Employment and Housing Commission held that the 80% rule may serve to justify an inference that there is a violation of the Act. FEHC Dec. No. 82-11 at 27-28. That rule, established by the Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 167.4D (1982), and adopted by the FEHC in CAL. ADMIN. CODE tit. 2, R. 7287.4(a) (1982), is as follows:

> A selection rate for any race, sex or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.

103. FEHC Dec. No. 82-06 (1982).

> plainant suffered an adverse employment decision; and (3) that a causal connection exists between the complainant's protected status and the adverse action."[104]

The Commission puts different emphasis on what is needed to prove "intent" by calling it "causal connection." The Commission has stated that this causal connection or nexus can be proved by establishing facts that create an inference of discrimination, as in *McDonnell Douglas Corp. v. Green*,[105] or by a showing of actual bias against complainant's group, or by other competent evidence.[106]

Actually, in most of the Commission cases, the prima facie or initial inference of discrimination is made by examining all of the Department's evidence. For example, in *DFEH v. Hubacher Cadillac/Saab, Inc.*[107] the Commission reiterated that there is no fixed formula for establishing a prima facie case, and found "an inference that an employment decision was based on discriminatory criteria under the Act" through 1) statistical data, 2) statements of hostility regarding the complainant's protected group, and 3) disparate treatment of complainant. Thus the Commission's position is that *McDonnell Douglas Corp. v. Green* sets out but one way of raising an inference of discrimination.[108]

If the Department has established a prima facie case, in the sense that a nexus existed between the complainant's protected status and the adverse action, the Commission examines the respondent's rebuttal and any affirmative defenses that the respondent may raise. If the respondent rebuts the prima facie case or if it establishes an affirmative defense, the Department will not prevail.[109]

Despite the fact that the prima facie case method established in *McDonnell Douglas* was "never intended to be rigid, mechanized, or ritualistic,"[110] under title VII it has been interpreted as a formalistic way of proving disparate treatment. The Commission, on the other hand, by looking at the evidence as a whole to decide whether discrimination exists, has clearly abandoned it as the primary analytical tool.

104. *Id.* at 5. *See also* DFEH v. City of Simi Valley, FEHC Dec. No. 83-21 at 6 (1983); DFEH v, San Francisco Mun. Ry. (Eskridge), FEHC Dec. No. 82-23 at 8 (1982).

105. 411 U.S. 792 (1973).

106. DFEH v. Ambylou Enter., Inc., FEHC Dec. No. 82-06 at 5-6 (1982); DFEH v. Lucky Stores, FEHC Dec. No. 80-30 (1980) (writ granted on other grounds, appeal pending).

107. FEHC Dec. No. 81-01 (1981). *See also* DFEH v. San Mateo, FEHC Dec. No. 82-16 (1982); DFEH v. Lucky Stores, FEHC Dec. No. 80-30 (1980).

108. *See, e.g.*, DFEH v. Sonoma County, FEHC Dec. No. 80-25 (1980) (Commission analyzes the case in *McDonnell Douglas v. Green* terms).

109. DFEH v. Ambylou Enter., Inc., FEHC Dec. No. 82-06 at 5 (1982).

110. *Id.* *See* United States Postal Serv. v. Aikens, 103 S. Ct. 1478, 1481 (1983); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).

Substantive Comparisons

Comparable Worth

The term "comparable worth" is usually understood to cover alleged discrimination in compensation where persons of one race or sex are paid less than other persons similarly situated for jobs which, although not substantially equal, are of "comparable worth" to the employer. Comparable worth litigation has been extremely controversial under title VII.[111] In contrast, such actions have been liberally allowed by the Commission.[112] Comparable worth litigation has been controversial for several reasons: the economic implications of such actions;[113] the uncertainty of proof under the theory;[114] and, until the United States Supreme Court decided *County of Washington v. Gunther*,[115] the belief by many courts that such cases were not embraced by title VII.[116] Under the FEHA, although the comparable worth concept

111. *See, e.g.*, County of Washington v. Gunther, 452 U.S. 161, 166 & 168 n.6 (1981).

112. *See, e.g.*, DFEH v. County of Madera, FEHC Dec. No. 83-22 (1983); DFEH v. Napa Hous. Auth., FEHC Dec. No. 81-12 (1981).

113. *See, e.g.*, E. LIVERNASH, COMPARABLE WORTH: ISSUES AND ALTERNATIVES (1980); Gasaway, *Comparable Worth: A Post-Gunther Overview Committee*, 69 GEO. L.J. 1123, 1161 (1981).

114. *See* Blumrosen, *Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964*, 12 U. MICH. J.L. REF. 397 (1979); Blumrosen, *Wage Discrimination and Job Segregation: The Survival of a Theory*, 14 U. MICH. J.L. REF. 1 (1981); Nelson, Opton, & Wilson, *Wage Discrimination and the "Comparable Worth" Theory in Perspective*, 13 U. MICH. J.L. REF. 231 (1980); Newman & Vonhof, *"Separate But Equal"—Job Segregation and Pay Equity in the Wake of Gunther*, 1981 U. ILL. L.F. REV. 269; Note, *Comparable Worth, Disparate Impact, and the Market Rate Salary Problems: A Legal Analysis and Statistical Application*, 71 CALIF. L. REV. 730 (1983); NOTE, *Women, Wages, and Title VII: The Significance of County of Washington v. Gunther*, 43 U. Pitt. L. Rev. 467 (1982).

115. 452 U.S. 161 (1981). The plaintiffs in *Gunther* alleged that female guards working in the female section of the county jail were paid less than male guards working in the male section. They alleged, inter alia, that part of the pay differential was attributable to intentional sex descrimination. They claimed that the county set the pay scale for female guards at a level lower than that warranted by the county's own survey of the outside market value of such jobs. *Id.* at 163-65. The district court held that a sex-based wage discrimination claim could not be brought under title VII unless it met the requirements of the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1976)—that the jobs be substantially equal. The district court therefore refused to take any evidence of the charge of intentional sex discrimination. *Id.*

The Ninth Circuit Court of Appeal reversed, 602 F.2d 882 (9th Cir. 1979), holding that persons alleging sex discrimination "are not precluded from suing under Title VII to protest . . . discriminatory compensation practices" merely because their jobs are not equal to higher paying jobs held by members of the opposite sex. *Id.* at 891. The Supreme Court affirmed, 451 U.S. 161, 166 (1981). *See infra* text accompanying notes 119-23.

116. Some courts, including the district court in *Gunther*, believed that the Bennett amendment to title VII, 42 U.S.C. § 2000e-2(h) (1976 & Supp. V 1981), limited sex-based wage claims to those covered by the provisions of the Equal Pay Act of 1963. *See* Orr v.

has not been explicitly explored,[117] disparate treatment claims can be proven in a fairly straightforward manner using the concept of nexus. Furthermore, the Commission is not burdened with the Bennett Amendment, discussed below, and the problems of interpreting affirmative defenses under the Equal Pay Act. Thus, plaintiffs with comparable worth claims are likely to find a California state court a more hospitable forum.

Jurisdictional Difference Between the FEHA and Title VII

The uncertainty under title VII regarding comparable worth arose from a specific provision within title VII, known as the Bennett Amendment,[118] which in turn refers to the Equal Pay Act of 1963.[119] While title VII makes it unlawful for an employer to "discriminate against any individual with respect to his compensation, . . . because of such individual's . . . sex,"[120] the Bennett Amendment says that it is not unlawful under title VII "for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid . . . if such differentiation is authorized by the provisions of the [Equal Pay Act]."[121]

In *Gunther*, the Supreme Court held that Congress, by passing the Bennett Amendment, intended only to incorporate the affirmative defenses of the Equal Pay Act.[122] The Equal Pay Act lists four defenses. Employers may pay unequal wages for equal jobs if the employer can prove that the difference is based on: 1) a seniority system; 2) a merit system; 3) a system which measures earnings by quantity or quality of production; or 4) a differential based on any other factor other than sex.[123] The Court reasoned that the Amendment bars sex-based discrimination claims under title VII only where the pay differential is "authorized" by the Equal Pay Act, and the Equal Pay Act in essence

McNeill & Son, Inc., 511 F.2d 166 (5th Cir.), *cert. denied*, 423 U.S. 65 (1975); Ammons v. Zia Co., 448 F.2d 117, 119-20 (10th Cir. 1971). *But see* International Union of Elec., Radio & Mach. Workers v. Westinghouse Elec. Corp., 631 F.2d 1094, 1099 (3d Cir. 1980), *cert. denied*, 449 U.S. 1009 (1981); Fitzgerald v. Sirloin Stockade, 624 F.2d 945 (10th Cir. 1980); Gerlach v. Michigan Bell Tel. Co., 501 F. Supp. 1300, 1319 (E.D. Mich. 1980).

117. In DFEH v. County of Madera, FEHC Dec. No. 83-22 (1983), the Commission stated that in a proper case a violation of the Act could be established "even where differently paid jobs are dissimilar, for example where a point-count job evaluation reveals that dissimilar jobs should be similarly paid." *Id.* at 39 n.2.

118. 42 U.S.C. § 2000e-2(h) (1976 & Supp. V 1981).

119. 29 U.S.C. § 206(d) (1976).

120. 42 U.S.C. § 2000e-2(a)(1) (1976).

121. *Id.* § 2000e-2(h).

122. 452 U.S. 161, 168 (1981).

123. 29 U.S.C. § 206(d) (1976).

"authorizes" an employer to differentiate in pay only when it meets one of the four defenses set forth in that Act.[124] Thus, the narrow holding of *Gunther* is merely that a claim of intentional sex-based wage discrimination may be litigated under title VII. The court expressly reserved judgment on whether the concept of "comparable worth" is viable under title VII.[125]

The problem with the Bennett Amendment does not arise under the Fair Employment and Housing Act.[126] The Act provides simply that "[i]t shall be an unlawful employment practice . . . (a) For an employer, because of the . . . sex of any person . . . to discriminate against such person in compensation or in terms, conditions or privileges of employment."[127] Unlike the Bennett Amendment, the FEHA provides no affirmative defenses for wage discrimination, other than the bona fide occupational qualification and government security provision, that apply to virtually all discrimination under the Act.[128] Thus unlike title VII, there is nothing in the California Act limiting its scope.

In the Commission's first wage discrimination case, *DFEH v. Napa Housing Authority*,[129] however, the respondent argued that even though there was no reference to any other statute in the FEHA, the case should not be analyzed under the Fair Employment and Housing Act but under California's Equal Pay Act.[130] The Commission rejected this contention, pointing out that the Fair Employment and Housing

124. County of Washington v. Gunther, 452 U.S. at 171.

125. *Id.* at 166 nn.6-7.

126. *See* DFEH v. Napa Hous. Auth., FEHC Dec. No. 81-12, at 13 n.3 (1981).

127. CAL. GOV'T CODE § 12940 (West 1980 & Supp. 1983).

128. *Id.* (introductory paragraph). The two affirmative defenses are available to any employer who is alleged to have discriminated against persons in all protected groups, except age over 40. Bona fide occupational qualification is defined in the Commission regulations as follows:

> Bona Fide Occupational Qualification (BFOQ). Where an employer or other covered entity has a practice which on its face excludes an entire group of individuals on a basis enumerated in the Act (e.g., all women or all individuals with lower back defects), the employer or other covered entity must prove that the practice is justified because all or substantially all of the excluded individuals are unable to safely and efficiently perform the job in question and because the essence of the business operation would otherwise be undermined.

CAL. ADMIN. CODE tit. 2, R. 7286.7(a) (1982).

129. FEHC Dec. No. 81-12 (1981).

130. CAL. LAB. CODE § 1197.5 (West Supp. 1983). The California Equal Pay Act provides:

> No employer shall pay any individual in the employer's employ at wage rates less than the rates paid to employees of the opposite sex in the same establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to a seniority system, a merit system, a

Act makes no reference to the California Equal Pay Act and that, under well established principles of statutory construction, statutes that concern related subjects, but do not refer to each other, are presumed to evidence different intents.[131] Therefore, the jurisdictional obstacles of the affirmative defenses of the federal Equal Pay Act, created by the Bennett Amendment to title VII, do not exist in an action brought under the FEHA.

The Prima Facie Case of Compensation Discrimination

Litigation in the area of compensation discrimination is still relatively new under both title VII and the FEHA. However, in cases that have been decided to date, courts seem to be following the same general approach towards proof of a prima facie case as in other litigation under title VII and the FEHA. When a case brought under title VII alleges an Equal Pay Act violation[132] (*i.e.*, the jobs are substantially equal), the courts follow the burden of proof standard set forth in the

system which measures earnings by quantity or quality of production, or a differential based on any bona fide factor other than sex.

Id.

The Act provides for two independent methods of enforcement. An aggrieved party can bring his or her charge to the Division of Labor Standards Enforcement for enforcement, *id.* § 1197.5(c), or bring a private action in state court, *id.* § 1197.5(g). In the latter case, the claimant need not first exhaust administrative remedies. *See* Jones v. Tracy School Dist., 27 Cal. 3d 99, 109, 611 P.2d 441, 446, 165 Cal. Rptr. 100, 105 (1980); Bass v. Great W. Sav. & Loan Ass'n, 58 Cal. App. 3d 770, 773, 130 Cal. Rptr. 123, 125 (1976). *Cf.* CAL. GOV'T CODE § 12960 (West 1980 & Supp. 1983) (requirement of exhaustion of administrative remedies under the FEHA).

131. DFEH v. Napa Hous. Auth., FEHC Dec. No. 81-12, at 13 (1981). This conclusion is buttressed by the legislative history of both statutes. The California Equal Pay Act was passed in 1948. 1949 Cal. Stat. ch. 804, § 1, at 1541. The original language was also set out in full in CAL. LAB. CODE § 1195.7 (West 1971) fourteen years before the federal Act of 1963, and ten years before the Fair Employment and Housing Act. As originally enacted, the law prohibited paying females "at wage rates less than the rates paid to male employees in the same establishment for the same quantity and quality of the same classification of work" but contained so many exceptions (including an exception for a collective bargaining contract) as to render the Act virtually useless. A 1957 amendment eliminated some of the exceptions. 1957 Cal. Stat. ch. 2384, § 1, at 4130. Two years later the Fair Employment Practices Act was passed without any protections for women. At the same time the FEPA was enacted, it had no logical relationship to the Equal Pay Act. In 1970 discrimination on account of sex was added to the Fair Employment Practices Act. *See supra* note 22 & accompanying text. Thus, at no time did the legislature indicate in any way that the two statutes were related or were to be interpreted in tandem. *See also* Bass v. Great W. Sav. & Loan Ass'n, 58 Cal. App. 3d 770, 772, 130 Cal. Rptr. 123, 125 (1976) (holding that California Labor Code § 1197.5 provides a comprehensive plan for processing and resolving complaints of sex discrimination independent of the FEHA).

132. *See, e.g.*, Corning Glass Works v. Brennan, 417 U.S. 188 (1974); Piva v. Xerox Corp., 654 F.2d 591, 598 (9th Cir. 1981); Odomes v. Nucare, Inc., 653 F.2d 246 (6th Cir. 1981); Melanson v. Rantoul, 536 F. Supp. 271 (D.R.I. 1982); Kouba v. Allstate Ins. Co., 523

leading Equal Pay Act case *Corning Glass Works v. Brennan*:[133] it is plaintiff's initial burden to prove that the employer pays workers of one sex more than workers of the opposite sex for work that requires similar skill, effort and responsibility and is performed under similar working conditions.[134] Under this approach, it is unnecessary for the plaintiff to prove intent.

The more difficult situation under title VII arises when the plaintiff alleges that she is discriminated against in compensation, but in comparison to an employee whose job is not substantially equal. In these comparable worth cases the courts analyze the facts under a disparate treatment theory and often rely on a *McDonnell Douglas Corp. v. Green*[135] analysis. The clearest example of this is *Briggs v. City of Madison*,[136] in which female public health nurses employed by the municipality claimed that on account of their sex they were paid less than the male public health sanitarians employed by the municipality. The court, after reviewing the preliminary showing required by *McDonnell Douglas Corp. v. Green*[137] and noting that the prima facie case standard is not inflexible,[138] set forth the following elements that plaintiffs alleging wage discrimination must show to establish a prima facie case:

1) the plaintiffs are members of a protected class;

2) they occupy a sex-segregated classification;

3) they are paid less than

4) a sex-segregated classification occupied by men; and

5) the two sex-segregated classifications involve work that is similar in skill, effort and responsibility.[139]

This five-part analysis rests on the premise that jobs which entail similar skill, effort, and responsibility are of comparable value to an employer and would be compensated comparably but for the employer's discriminatory treatment.[140] The burden then shifts to the employer to come forward with non-discriminatory reasons for the

F. Supp. 148 (E.D. Cal. 1981), *rev'd on other grounds*, 691 F.2d 873 (9th Cir. 1982); Walter v. KFGO Radio, 518 F. Supp. 1309 (D.N.D. 1981).

133. 417 U.S. 188 (1974).

134. *Id.* at 195.

135. 411 U.S. 792 (1973). *See supra* text accompanying notes 97-102.

136. 536 F. Supp. 435 (W.D. Wis. 1982).

137. *See supra* notes 98-99 & accompanying text.

138. Briggs v. City of Madison, 536 F. Supp. at 443 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.13 (1973)). *See also* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 575 (1978).

139. Briggs v. City of Madison, 536 F. Supp. at 445.

140. *Id.*

challenged pay disparity.[141] A similar approach was discussed in *Heagney v. University of Washington*[142] where the court stated that evidence of a statistical difference in the salaries between men and women and a study showing the jobs to be equal as to skill, effort, and responsibility, might constitute a prima facie case under title VII.[143]

Other title VII cases have been decided on the basis of disparate treatment with regard to the salary-setting mechanism itself rather than the comparison of the jobs. For example, in *Wilkins v. University of Houston*,[144] an analysis of the implementation of a pay plan showed that men were paid more than the maximum allowed by the plan, while women were paid less than the minimum.[145] In *Boyd v. Madison County Mutual Insurance Co.*,[146] a prima facie case was established by evidence showing that all the female employees were eligible for bonuses while the male employees were not.[147] In *Roesel v. Joliet Wrought Washer Co.*,[148] discrimination was found when, although all female managers had lower salaries than all male managers, one was given a $2,000 pay raise after investigators from the Office of Federal Contract Compliance challenged the salary system. Because the plaintiff's job was substantially equal to the female who received the pay raise, the court inferred that plaintiff's lower salary was due to her sex.[149]

The Fair Employment and Housing Commission has decided two compensation cases to date, and in both it looked for the nexus between the protected status of the complainant and the adverse action complained of, and used all the available evidence to find the connection.[150] The facts of the Commission's first case, *DFEH v. Napa Housing Authority*,[151] are complex. The respondent Housing Authority was responsible for administering various and changing HUD programs that provided low cost housing for eligible persons. When the Housing Authority's first and only two employees were hired, com-

141. *Id.* at 446.

142. 642 F.2d 1157 (9th Cir. 1981).

143. *Id.* at 1166. *See also* Connecticut State Employees Ass'n v. Connecticut, 31 Empl. Prac. Dec. (CCH) ¶ 33,528 (D. Conn. 1983); American Fed'n of State, County & Mun. Employees v. Washington, No. C82-465T (W.D. Wash. Sept. 13, 1983).

144. 654 F.2d 388 (5th Cir. 1981), *rev'd on other grounds*, 103 S. Ct. 34 (1982).

145. *Id.* at 406-07.

146. 654 F.2d 1173 (7th Cir. 1981), *cert. denied*, 454 U.S. 1146 (1982).

147. *Id.* at 1178.

148. 596 F.2d 183 (7th Cir. 1979).

149. *Id.* at 186.

150. See *supra* text accompanying notes 102-10 for discussion of the nexus standard.

151. FEHC Dec. No. 81-12 (1981).

plainant Sebia, the female, was classified as a clerk-typist and Morrissey, the male, as a Management Assistant. From the beginning of their employment, their actual duties differed from those suggested by their job descriptions.[152] Their jobs continued to change over time, so that by 1976, Sebia was working as the assistant director of the program—negotiating contracts, determining eligibility of applicants, filling in HUD reports and generally running the operation. Morrissey, on the other hand, was performing the out-of-office duties such as checking housing, contacting landlords, and resolving disputes. Despite Sebia's increased responsibilities, the respondent refused to promote her or give her pay raises commensurate with the managerial nature of her job, and relegated her to the clerical pay range. Morrissey continually received substantial promotions and pay raises.[153] This disparate treatment was the subject of the complaint.

The Commission began its analysis of this fact situation by determining that Sebia had suffered an adverse employment decision in that her wages were depressed by virtue of her improper classification as a secretary and because she was consistently denied promotions and job descriptions failed to accurately reflect her actual duties. It determined that Sebia's actual duties bore little resemblance to secretarial work, noting that a full-time clerk-typist had been hired to assist Sebia, and that respondent's refusal to upgrade Sebia's classification was unjustified.[154]

Having determined that complainant suffered an adverse employment decision, the Commission examined whether a causal connection existed between complainant's sex and the adverse decision. Here the Commission looked at several factors. The heart of its decision was the disparate treatment Morrissey received in comparison to Sebia: his job description was altered in 1970 and 1973 to reflect his actual duties while hers was not. Her job continued to be classified as clerical despite the fact that her work was manifestly of a managerial and professional nature, while his was correctly classified as professional.[155] In 1976, after repeatedly asking for reclassification, she was given the title "Occupancy Specialist." The job description for this title was identical to Morrissey's initial Management Assistant job description, yet his salary was never pegged to the clerical level.

The Commission seemed particularly bothered by the stereotypi-

152. *Id.* at 2-3.
153. *Id.* at 3-8.
154. *Id.* at 15.
155. *Id.* at 17.

cal notions of woman's work that it found infected all aspects of the respondent's decision-making. Napa's personnel director, for example, testified that Sebia's extensive managerial and decision-making duties were consistent with the secretarial functions of screening phone calls, giving information, interpreting departmental policy and regulations and general office management—all of which were secretarial duties. The Commission noted: "According to this selective and overbroad reading of the secretary job description . . . all the City's white collar workers might well be classified as secretaries."[156] It went on to state that "[a] vague job description, especially in a field traditionally identified as women's work, may well facilitate reliance on irrelevant sexual stereotypes in assigning job titles to women."[157] Furthermore, the Commission relied on reputation and opinion testimony with respect to the City Manager's discriminatory attitude toward female employees. Evidence was submitted to show that he viewed women as secretaries and exercised considerable influence on city personnel decisions. The Commission also credited the Department's statistical evidence that women were underrepresented in the professional ranks in Napa and overrepresented in clerical positions.[158] Thus the Commission found the Department had established its prima facie case.

The Commission's second compensation case, *DFEH v. County of Madera*,[159] was factually similar to *County of Washington v. Gunther*.[160] It involved charges that female Matron-Dispatchers who, among other things, guarded female prisoners, were paid less than male Deputy Sheriffs who guarded male prisoners. As in *DFEH v. Napa Housing Authority*,[161] the Commission found relevant the history of the Matron-Dispatcher job; it held that although the job responsibilities of both males and females had evolved over time, the women's salaries were consistently set lower no matter how similar the female duties were to those of the males.[162]

The Commission's finding that there was a nexus between the complainants' salaries and their sex, *i.e.*, that respondent had intention-

156. *Id.* at 16.

157. *Id.*

158. The Commission had previously held that statistics are relevant to show nexus and otherwise buttress the Department's prima facie case and proof of liability. *See, e.g.*, DFEH v. Hubacher Cadillac/Saab, Inc., FEHC Dec. No. 81-01, at 7 (1981); DFEH v. Lucky Stores, FEHC Dec. No. 80-30 (1980).

159. FEHC Dec. No. 83-22 (1983).

160. 452 U.S. 161 (1981). See facts discussed *supra* note 115.

161. DFEH v. Napa Hous. Auth., FEHC Dec. No. 81-12 (1981).

162. DFEH v. County of Madera, FEHC Dec. No. 83-22 at 35-36.

ally discriminated against women in setting their wages lower than men, was "inferred from the fact that it regularly and purposefully treated women differently and generally less favorably than men."[163] An important finding of fact was that respondent had maintained sex-segregated job classifications.[164] The Matron-Dispatcher job was reserved for women. The comparable male job, Deputy Sheriff, had been exclusively male until one female was hired in 1979.[165] That job had, until 1979, a height and weight requirement that was found to discriminate against women and was not related to a business purpose.[166] Women were also expressly excluded from participating in the Sheriff's reserves, a volunteer group that provided a unique opportunity for job-qualifying experience.[167]

Other examples of disparate treatment caused the Commission to find intentional discrimination in compensation. Although the women complainants were sworn, uniformed, armed, and identified as Deputy Sheriffs, they were classified and compensated as Matron-Dispatchers.[168] They were provided a lesser uniform allowance for essentially identical uniforms.[169] The men received training paid for by the respondent while the complainants received little or no training.[170]

Finally, the Commission considered other evidence of discriminatory attitudes towards women. These included the respondent's failure to follow any recommendations of the State Personnel Board beneficial to complainants while implementing a whole series of upgrades for male employees.[171] This evidence, combined with a showing that the respondent's compensation practices treated complainants differently than male Deputy Sheriffs with similar duties,[172] combined to satisfy the Commission that respondent had discriminated on the basis sex.[173]

163. *Id.* at 38.
164. *Id.*
165. *Id.* at 34.
166. *Id.*
167. *Id.*
168. *Id.* at 38.
169. *Id.*
170. *Id.* at 35.
171. *Id.* at 37.
172. See discussion of compensation defenses *supra* notes 199-204 & accompanying text.
173. *Id.* at 38. In *DFEH v. Napa Housing Authority*, after considering all of the Department's evidence, the Commission found the Department had established a "prima facie case." FEHC Dec. No. 81-12 at 13-19 (1981). In contrast, in evaluating the Department's evidence in *County of Madera* the Commission found "sex discrimination," *i.e.*, the entire Department case. FEHC Dec. No. 83-22 at 38. In *Napa Housing Authority*, the Commission went on to look at the respondent's "defenses." In *County of Madera*, the Commission examined the "affirmative defenses." The authors believe this is further indication of the

Defenses in Compensation Litigation

The case law regarding defenses in compensation litigation is even less developed under title VII than the case law regarding the prima facie case. Again, the approach differs depending whether the case is an Equal Pay Act-type of title VII case or one dealing with different jobs. In the Equal Pay Act-type of title VII cases the defenses are the same as under the Equal Pay Act.[174] The defendant may show that the jobs are not substantially equal,[175] or may prove as an affirmative defense[176] that the unequal pay is authorized by seniority, merit, quality or quantity of production, or a factor other than sex.[177] The latter element is most often litigated. Typical defenses are that 1) the higher paid person is in a special training program justifying a higher wage to workers of one sex;[178] 2) the higher paid person has desirable characteristics for hire, such as more education or experience;[179] and 3) the difference in pay is based on different value in the labor market.[180] However, it has been held that a market value rate justification, when the market rate is itself a reflection of the historical discrimination against women, will not be considered a sufficient defense under the Equal Pay Act.[181]

In a title VII case without an Equal Pay Act allegation, on the other hand, the standard is much less certain. The Supreme Court in *Gunther*[182] held that the first three Equal Pay Act defenses apply to title VII cases, and indeed are worded similarly to defense language in title

Commission's abandonment of the title VII notion of prima facie case embodied in McDonnell Douglas v. Green, 411 U.S. 792 (1973). *See supra* notes 102-110 & accompanying text.

174. *See supra* notes 120-22 & accompanying text.

175. Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974); Hodgson v. Brookhaven Gen. Hosp., 436 F.2d 719, 725 (5th Cir. 1970) (jobs not entailing equal effort are not substantially equal); Shultz v. Wheaten Glass Co., 421 F.2d 259, 265 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970) (Congress intended a standard of substantial, not literal, equality under the Equal Pay Act).

176. County of Washington v. Gunther, 452 U.S. 161, 167 (1981); Corning Glass Works v. Brennan, 417 U.S. 188, 196-97 (1974).

177. 29 U.S.C. § 206(d) (1976).

178. Shultz v. First Victoria Nat'l Bank, 420 F.2d 648, 653 (5th Cir. 1969).

179. Herman v. Roosevelt Fed. Sav. & Loan Ass'n, 432 F. Supp. 843, 851 (E.D. Mo. 1977); Bullock v. Pizza Hut, Inc., 429 F. Supp. 424, 430 (M.D. La. 1977).

180. Corning Glass Works v. Brennan, 417 U.S. 188, 204 (1974).

181. *See, e.g.*, Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 451 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978); Brennan v. Victoria Bank & Trust Co., 493 F.2d 896, 902 (5th Cir. 1974); Hodgson v. Brookhaven Gen. Hosp., 436 F.2d 719, 726 (5th Cir. 1970); Di Salvo v. Chamber of Commerce of Greater Kansas City, 416 F. Supp. 844, 853 (W.D. Mo. 1976), *aff'd as modified*, 568 F.2d 593, 597 (8th Cir. 1978); Hodgson v. Maison Miramom, Inc., 344 F. Supp. 843, 849 (E.D. La. 1972).

182. 452 U.S. 161 (1981).

VII itself.[183] The Court stated that the fourth defense—a factor other than sex—is also incorporated into title VII, but gave no opinion on how it would work.[184] Other cases decided under title VII describe the defendant's burden as that of showing that the disparity in pay is based on a legitimate non-discriminatory reason. In *Briggs v. City of Madison*,[185] for example, the defendant introduced evidence that there were legitimate non-discriminatory reasons for the proven pay disparity: the market rate was higher for male sanitarians than for female nurses, the sanitarian jobs were more difficult to fill, making the higher salaries necessary to attract applicants, and much of the pay differential was accounted for by an independent salary survey conducted for the defendant that recommended the differential.[186] Whether these non-discriminatory reasons would support the fourth Equal Pay Act defense and who has the burden of proof are open questions. In cases brought under the FEHA, after the Commission finds that the Department has proven its prima facie case[187] it normally goes on to examine all the respondent's defenses. In *DFEH v. Napa Housing Authority*,[188] the Commission's first compensation case, most of the defenses raised were of the type traditionally raised under the federal Equal Pay Act.

The first defense was that Morrissey's initial salary was higher than Sebia's because of his college education and managerial experience. The Commission found that the respondent failed to prove that Morrissey's salary was in fact based on his education and experience and that the possession of such credentials was relevant to the job.[189]

Respondent also argued that Morrissey's higher salary reflected the prevailing community wage and was necessary to attract highly qualified applicants. The Commission found that the respondent had

183. *Compare* 42 U.S.C. § 2000e-2(h) (1976 & Supp. V 1981) ("it shall not be an unlawful employment practice for an employer to apply different standards of compensation . . . pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production . . .") *with* first three defenses in the Equal Pay Act, 29 U.S.C. §§ 206(d)(1)(i)-(iii) (1976) (a seniority system, a merit system, and a system which measures earnings by quantity or quality of production).

184. County of Washington v. Gunther, 452 U.S. at 170-71.

185. 536 F. Supp. 435 (W.D. Wis. 1982).

186. *Id.* at 446-47. *See also* Boyd v. Madison County Mutual Ins. Co., 653 F.2d 1173, 1178 (7th Cir. 1981), *cert. denied*, 454 U.S. 1146 (1982) (bonuses available to female clericals only as an incentive to rectify absentee problem).

187. *See supra* text accompanying notes 150-58.

188. FEHC Dec. No. 81-12 (1981).

189. *Id.* (citing Herman v. Roosevelt Fed. Sav. & Loan Ass'n, 432 F.Supp. 843 (E.D. Mo. 1977) (a federal Equal Pay Act case), and Bullock v. Pizza Hut, Inc., 429 F. Supp. 424 (M.D. La. 1977) (a combination Equal Pay Act and title VII case)).

failed to prove any facts to support this theory.[190] The Commission further held that if the respondent meant to argue that a woman's worth in the market place was less than a man's this argument would fail as well because "[t]his is the very sort of sex discrimination which our Act is designed to obliterate."[191] For this proposition the Commission referred to the United States Supreme Court holding in *Corning Glass Works v. Brennan*,[192] a federal Equal Pay Act case in which the Court held that the relative ease of recruiting women to low paying jobs did not constitute a factor other than sex and thus was not an affirmative defense under that Act.[193]

While it is fairly well established that a market rate which reflects historic discrimination against women will not be considered a defense under the Equal Pay Act,[194] that proposition has not been firmly established in comparable worth cases litigated solely under title VII.[195] Although it has been forcefully argued that the *Corning Glass* principle could apply to wage discrimination claims under title VII,[196] at least one district court has held that it does not.[197] However that decision is resolved in the federal courts, the Commission has held that market rates will not constitute a defense to wage discrimination under the FEHA where such rates reflect women's historically weak position in the labor market.

The Commission in *DFEH v. Napa Housing Authority* also rejected the respondent's contention that Morrissey was entitled to more

190. DFEH v. Napa Hous. Auth., FEHC Dec. No. 81-12 at 19. In contrast, in a recent federal comparable worth case, Briggs v. City of Madison, 536 F. Supp. 435 (W.D. Wis. 1982), after plaintiffs had made a prima facie showing of wage discrimination against female nurses, the defendant produced evidence of a legitimate non-discriminatory reason for the disparity: *i.e.*, there was a shortage of candidates for the traditionally male sanitarian job and the higher salary was necessary to attract applicants. The court found that the plaintiffs had failed to show this reason was pretextual, but that they might have done so by showing the size of the labor pools for the male and female jobs, the number of vacancies or the average time that jobs went unfilled. *Id.* at 446-48.

191. DFEH v. Napa Hous. Auth., FEHC Dec. No. 81-12 at 21.

192. 417 U.S. 188 (1973).

193. *Id.* at 205.

194. *See* cases cited *supra* note 181.

195. In at least one case litigated under both the Equal Pay Act and title VII, Bullock v. Pizza Hut, Inc., 429 F. Supp. 424 (M.D. La. 1977), the court held that the market rate did not constitute a defense. *Id.* at 430 (following *Corning Glass*). But in Kouba v. Allstate Ins. Co., 691 F.2d 873 (9th Cir. 1982), the court in discussing the "factor other than sex" defense allowed the defendant to attempt to prove on remand that the use of the market rate was justified by a business reason and was not a pretext for discrimination. *Id.* at 876-77. This standard seems half-way between the Equal Pay Act and title VII.

196. Newman & Vonhof, *supra* note 114, at 314.

197. Briggs v. City of Madison, 536 F. Supp. 435, 447 (W.D. Wis. 1982).

pay because his job required greater skills, because the evidence did not support the contention that he had or used special skills. That Morrissey might have worked independently did not justify the pay disparity, since Sebia was also largely unsupervised. The Commission ultimately held that the respondent had failed to rebut the department's prima facie case and that the preponderance of evidence showed that respondent discriminated against complainant in compensation, terms, conditions, and privileges of employment because of her sex.[198]

The Commission approached the defenses in a different way in the *County of Madera* case. Rather than discussing the respondent's defenses separately as it did in *Napa Housing Authority*, the Commission examined them in its analysis of the Department's case in chief. The respondent's principal defense was that the women were paid less than the men because their job duties were substantially different; in particular, the Matron-Dispatchers were responsible for fewer inmates. The Commission found, however, that this was because the respondent assigned the Matron-Dispatcher only to female inmates, and that this assignment was based on sex.[199] There was no showing, moreover, that the women were paid according to the amount of jail work they did. The evidence indicated the women "worked harder than the jail-Deputies, who had only jail work as their primary responsibility," while the women had their dispatch work too.[200] The Commission noted that it was not holding that an employer could not classify and compensate its employees to reflect the duties assigned, "so long as sex (or another prohibited basis) is not a factor in the classification."[201]

The respondent also denied creating all male and all female job categories. The defense that the decision to create the Matron-Dispatcher class was not based on sex was rejected because the title of the position was gender-linked, the position was created as part of a decision to take the dispatcher duties away from the male deputies and assign them to the female matrons, and was filled solely by women.[202] Respondent denied discriminating against women in their admission to the male Deputy Sheriff class. Respondent asserted that the height and weight requirement did not affect these complainants because the requirements could have been waived. The Commission rejected this argument, holding that such requirements were used to inform potential

198. DPEH v. Napa Hous. Auth., FEHC Dec. No. 81-12 at 23 (1981).
199. FEHC Dec. No. 83-22 at 37 (1983).
200. *Id.* at 37.
201. *Id.* at 39.
202. *Id.* at 33.

job applicants of job requirements and had discouraged these complainants from applying.[203] The Commission finally noted that while a bona fide occupational qualification affirmative defense was available to respondent, no such defense had been proved.[204]

Marital Status

The Fair Employment and Housing Act expressly prohibits discrimination in employment on the basis of marital status, whereas title VII does not. Title VII covers marital status indirectly, as a species of sex discrimination where certain marital status policies have an adverse impact on women or are intended to discriminate. However, many forms of discrimination are not covered at all under title VII and for those that are, the standard of proof—involving an adverse impact element not required under the state Act—is more difficult to meet. Plaintiffs are able to remedy marital status discrimination more directly under the FEHA.

The provision barring discrimination on the basis of marital status was added to the then Fair Employment Practices Act and the Rumford Fair Housing Act in 1976.[205] As part of the 1976 amendments the legislature specifically found that discrimination on the basis of marital status is against public policy[206] and that the right to seek, obtain, and hold employment without discrimination because of marital status is a civil right.[207]

Marital status discrimination is not covered directly under title VII but it has been found illegal in certain situations when rules concerning marital status affect women and not men. A typical case is *Sprogis v. United Airlines*,[208] in which the defendant had a policy that female flight attendants could not be married but male flight attendants could. Because this rule impacted adversely on women, it was held to be unlawful sex discrimination.[209] In *Yuhas v. Libbey-Owens-Ford Co.*,[210] a prima facie case of sex discrimination was established where a rule

203. *Id.* at 34.

204. *Id.* at 38-39.

205. 1976 Cal. Stat. ch. 1195, § 1, at 5459.

206. CAL. GOV'T CODE § 12920 (West 1980).

207. *Id.* § 12921.

208. 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971).

209. *Id.* at 1197-98. The court relied in part on the EEOC Guidelines on sex discrimination which provide:

> The Commission had determined that an employer's rule which forbids or restricts the employment of married women and which is not applicable to married men is a discrimination based on sex prohibited by Title VII of the Civil Rights Act. It does not seem to us relevant that the rule is not directed against all females, but

prohibiting employment of spouses affected seventy-one women and only three men.[211] But in cases where the airline employed no male flight attendants and had a no-marriage rule, it was held lawful because there was no disparate impact.[212] Under title VII, anti-marriage and no-spouse rules that do not have an adverse impact on one sex are generally not held unlawful.[213]

Under the FEHA, any rule requiring employees to be either married or single is illegal regardless of its impact on only one sex. The Commission has stated that marital status discrimination can be established by showing that an applicant or employee has been denied employment benefit by reason of:

1) the fact that the applicant or employee is not married;

2) an applicant's or employee's "single" or "married" status, or

3) the employment or lack of employment of an applicant's or employee's spouse.[214]

Thus, the mere consideration of marital status of an applicant or employee is prohibited by the FEHA. Three precedential decisions on the subject of marital status have focused on the definition of marital status. One has addressed the employer's affirmative defenses.

The first, *DFEH v. Hess & Hess*,[215] a housing case,[216] was fairly straightforward. The respondents had accepted complainants' application and deposit without inquiring as to their marital status. When the landlords discovered that complainants were not married, they refused to rent them the unit. This was held to be unlawful marital status

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only against married females, for so long as sex is a factor in the application of the rule, such application involves a discrimination based on sex.

29 C.F.R. § 1604.3(a) (1982).

210. 562 F.2d 496 (7th Cir. 1977).

211. *Id.* at 498.

212. Stroud v. Delta Airlines, Inc., 544 F.2d 892, 893-94 (5th Cir. 1977), *cert. denied*, 434 U.S. 844 (1978). The law in this area may be changing, however. In Gordon v. Continental Airlines, 30 Fair Empl. Prac. Cas. 235 (9th Cir. 1982), the court ruled that maximum weight requirements applied to an all-female flight attendant category were illegal under title VII. The court held that plaintiffs did not need to prove men were performing similar work. Intent would be inferred from the segregation of women in this position. *But see* Costa v. Markey, 677 F.2d 158, 161-62 (1st Cir. 1982) (upholding minimum height requirement as it applied to an all-female applicant pool).

213. Tuck v. McGraw Hill, Inc., 421 F. Supp. 39, 44-45 (S.D.N.Y. 1976); Smith v. Mutual Benefits Life Ins. Co., 13 Fair Empl. Prac. Cas. 252, 253 (D.N.J. 1976).

214. CAL. ADMIN. CODE tit. 2, R. 7292.2 (1982).

215. FEHC Dec. No. 80-10 (1980), *aff'd*, 138 Cal. App. 3d 232, 187 Cal. Rptr. 712 (1982).

216. In DFEH v. Boy Scouts of Am., FEHC Dec. No. 81-15 (1981), the Commission said that "construction of the employment discrimination provisions with the housing discrimination provisions of the Act is instructive." *Id.* at 9.

discrimination.[217]

Similarly, in *DFEH v. Neugebauer*,[218] the Commission found marital status discrimination where the respondent expressed a preference for a married couple over the complainant, who was a widow. In that case, the respondent contended that the decision not to rent was based only in part on the fact that the complainant was not married. She allegedly was denied the apartment in question in part because the landlord feared complainant would use her power tools in the apartment and disrupt the other tenants. The Commission held that a prohibited basis like marital status (or race) cannot be any part of the reason a prospective tenant is denied housing.[219] It thus found unlawful discrimination.[220]

This holding was reiterated in the employment setting in *DFEH v. City of Simi Valley*[221] in which an employer refused to hire the complainant as a mechanic in the Department of Public Works because his wife was employed as a clerk in the same Department. The Commission found that the employer had discriminated on the basis of marital status. The Commission held that "the evidence need not demonstrate that complainant's marital status was the sole or even the dominant cause of his adverse treatment; discrimination is established if complainant's marital status was at least one of the factors influencing re-

217. The respondent's defense, which was rejected by the Commission, was that, although they allowed married couples to aggregate their income for the purposes of determining financial eligibility, they did not allow unmarried couples to do so because they were not legally liable for each other's debts. This defense, which is frequently raised in housing discrimination cases, was also ruled to lack merit by the Court of Appeal which affirmed the Commission's decision. Hess & Hess v. FEHC, 138 Cal. App. 3d 232, 187 Cal. Rptr. 712 (1982). The appellate court referred to a provision of the Equal Credit Opportunity Act, 15 U.S.C. § 1691(a) (1976), which prohibits creditors from discriminating against applicants on the basis of marital status, and a case decided under the federal Act, Markham v. Colonial Mort. Serv. Co. Assoc., 605 F.2d 566 (D.C. Cir. 1979). That case held that it was unlawful for a creditor to treat applicants differently—that is refuse to aggregate their incomes—solely because of their marital status. The *Hess* court pointed out, as did the Commission, that the landlord could require each tenant to be personally liable for the amount of the rent and thus have a contract action against each of them. 138 Cal. App. 3d at 236, 187 Cal. Rptr. at 715.

218. FEHC Dec. No. 80-14 (1980).

219. *Id.* at 6. The Commission cited Smith v. Sol D. Adler Realty Co., 436 F.2d 344, 349-50 (7th Cir. 1970) (decided under 42 U.S.C. § 1982) and United States v. Pelzer Realty Co., Inc., 484 F.2d 438 (5th Cir. 1973), *cert. denied*, 416 U.S. 936 (1974) (decided under the Federal Fair Housing Act, 42 U.S.C. § 3604).

220. The Commission has also held, in the employment context, that a showing that a protected basis was a factor contributing to the employment decisions can be enough to establish a prima facie case. DFEH v. Lucky Stores, FEHC Dec. No. 80-30 at 17 (1980).

221. FEHC Dec. No. 83-21 (1983).

spondent's actions."[222] In *City of Simi Valley*, the employer had a "no-spouse" rule that was the sole cause of complainant's rejection. This was held to constitute unlawful marital status discrimination.

In *DFEH v. Boy Scouts of America*,[223] the Commission found unlawful marital status discrimination in an employment context when the respondent refused to hire complainant because he was living with a woman not his wife. The Boy Scouts argued that their refusal to hire was based on the applicant's unmarried cohabitation and not on his marital status. The Commission disagreed, citing first its regulations defining marital status as "[a]n individual's state of marriage, dissolution, separation, widowhood, annulment, or other marital state."[224] It noted that the respondent had virtually conceded that had complainant been married to the woman he lived with, he would have been considered for the job for which he applied. Second, the Commission cited two cases, *Atkinson v. Kern County Housing Authority*[225] and *DFEH v. Hess & Hess*,[226] holding that in the housing context, refusal to rent on the basis of marital status was established where the refusal was based on unmarried cohabitation. The Commission held that the case law in the area of housing discrimination applied fully to the employment sections of the Act.[227]

Read together, the FEHA, regulations, and precedential decisions described above indicate that the definition of marital status discrimination is very broad under the Act. It includes the mere status of being married or unmarried, living arrangements including cohabitation or living with relatives other than a spouse, and nepotism rules as they affect spouses. Other states that prohibit discrimination on the basis of marital status have established narrower definitions. For example, in *McFadden v. Elma Country Club*,[228] the Washington state court held that a statute banning marital status discrimination in real estate trans-

222. *Id.* at 6. The Commission cited the following precedential decisions: DFEH v. Northrup Serv., FEHC Dec. No. 83-11 at 9 (1983) (age); DFEH v. Hubacher Cadillac/Saab, Inc., FEHC Dec. No 81-01 at 15 (1981) (sex); DFEH v. Lucky Stores, FEHC Dec. No. 80-30 at 17 (1980) (sex).

223. FEHC Dec. No. 81-15 (1981).

224. CAL. ADMIN. CODE tit. 2, R. 7292.1(a) (1982).

225. 59 Cal. App. 3d 89, 130 Cal. Rptr. 375 (1976). This case involved the refusal of a public housing authority to rent to an unmarried woman and her boyfriend. The action was brought under a HUD ruling that marital status could not be the sole basis for excluding an applicant, but the court referred to the marital status provision of the FEHA.

226. FEHC Dec. No. 80-10 (1980). *See supra* notes 192-94 & accompanying text (discussion of *Hess*).

227. DFEH v. Boy Scouts of Am., FEHC Dec. No. 81-15, at 9.

228. 26 Wash. App. 195, 613 P.2d 146 (1980).

actions did not include discrimination against couples who lived together without being married. The Commission distinguished this case in *DFEH v. Boy Scouts* on the ground that unmarried cohabitation was unlawful in Washington at the time marital status was added to its civil rights act, while in California such cohabitation was legalized in 1975, one year before marital status was added to the California Act.[229]

New York and Michigan appear to be heading in a different direction than California in the area of no-spouse rules. In *DFEH v. City of Simi Valley*,[230] the Commission found that a no-spouse rule used to deny employment constituted unlawful marital status discrimination. But in New York and Michigan, courts have expressly stated that no-spouse rules do not constitute marital status discrimination. For example, in *Klanseck v. Prudential Insurance Co.*,[231] the defendant had a rule that if two "district agents" married, one had to transfer to "ordinary agent." The court held that the operative distinction was the identity and occupation of the spouse and not his or her existence, and therefore there was no marital status discrimination. In *Manhattan Pizza Hut, Inc. v. New York Human Rights Appeal Board*,[232] a female employee was fired because her husband was promoted to supervisor. The court held that she was not discharged because she was married, but because she was married to her supervisor. This was held not to be marital status discrimination.

In California, the Commission probably would find a prima facie case of marital status discrimination in both of these fact situations. The Commission would then examine the employer's affirmative defenses concerning supervision, safety, security, and morale. The Fair Employment and Housing Act specifically provides:

> Nothing in this part relating to discrimination on account of marital status shall . . . affect the right of an employer to reasonably regulate, for reasons of supervision, safety, security, or morale, the working of spouses in the same department, divisions, or facility, consisent with the rules and regulations adopted by the commission . . . .[233]

The Commission's regulations state: "For business reasons of supervision, security or morale, an employer may refuse to place other spouses in the same department, division or facility if the work involves poten-

229. DFEH v. Boy Scouts of Am., FEHC Dec. No. 81-15, at 9. *See* 1975 Cal. Stat. ch. 71, §§ 5-6 (repealing CAL. PENAL CODE §§ 269 (a)-(b) (West 1970) which made cohabitation a misdemeanor).

230. FEHC Dec. No. 83-21 (1983).

231. 25 Empl. Prac. Dec. ¶ 31,705 at 20,072 (E.D. Mich. 1981).

232. 25 Empl. Prac. Dec. ¶ 32,634 at 19,689 (N.Y. 1980).

233. CAL. GOVT. CODE § 12940(a)(3) (West 1980).

tial conflicts of interest or other hazards greater for married couples than for other persons."[234] The regulations also establish an affirmative defense for refusing to place one spouse under the direct supervision of another spouse.[235] Since these are affirmative defenses under the Act, the Commission has held that the respondent must prove the defenses by a preponderance of the evidence.[236]

While federal courts have permitted defendants to prove their marital status discrimination defenses through broad generalizations and speculation regarding married couples in general,[237] the Commission held in *DFEH v. City of Simi Valley*[238] that respondents in marital status cases cannot rest their affirmative defenses entirely on such generalizations. Rather, credible proof in the nature of admissible evidence must support the defenses.[239]

The Commission, in *City of Simi Valley*, examined respondent's defense that hiring spouses in the same department would involve potential conflict of interest and other hazards greater for married couples than for other persons. The Commission's standard of proof was high: respondent was required to produce hard, credible evidence that the potential conflict or hazard existed for the particular spouse involved; that the hazard or conflict was greater than the conflict or hazard with unmarried employees; and that, if acted upon, the hazard or conflicting spousal interests would produce substantial harm to the employer.[240] In *City of Simi Valley*, the Commission did not find hard credible evidence that complainant's clerk-wife in a nine-person department might falsify her husband's time sheets or breach the confidentiality of personnel files, or that, if she did so, the resulting harm would be substantial enough to justify complainant's rejection.[241] Further, the

234. CAL. ADMIN. CODE tit. 2, R. 7292.5(a)(2) (1982).

235. CAL. ADMIN. CODE tit. 2, R. 7292.5(a)(1) (1982).

236. DFEH v. City of Simi Valley, FEHC Dec. No. 83-21 at 7 (1983). *See also* Sterling Transit Co. v. FEPC, 121 Cal. App. 3d 791, 796 (1981); DFEH v. City of Anaheim Police Dep't, FEHC Dec. No. 82-08 at 14 (1982); DFEH v. County of Alameda, FEHC Dec. No. 81-13 at 21 (1981).

237. Espinoza v. Thomas, 580 F.2d 346 (8th Cir. 1978); Yuhas v. Libbey-Owens-Ford Co., 562 F.2d 496 (7th Cir. 1977), *cert. denied*, 435 U.S. 934 (1978).

238. FEHC Dec. No. 83-21 (1983).

239. *Id.* at 8-9.

240. *Id.* at 7 & 10.

241. *Id.* at 10. *Cf.* Klansech v. Prudential Ins. Co., 23 Fair Empl. Prac. Cas. (BNA) 163 (E.D. Mich. 1981) (defendant tried to justify its practice of not allowing two "district agents" to marry on the ground that the possibility of manipulation of accounts was greater for married couple filing joint returns than non-spousal teams; ultimately, it was decided that the no-spouse rule did not constitute marital status discrimination, and the defense was not ruled on).

Commission found no hard credible evidence to support the respondent's belief that complainant and his spouse would either socialize excessively or fight in the work place. Therefore it found no affirmative defense had been established.[242]

Seen as a whole, marital status receives special protection in California. The California statute expressly covers situations excluded from title VII and is interpreted more liberally than similar provisions in other states. Furthermore, the defenses described in the regulations are very narrowly drawn so as to protect potential victims of discrimination.

Physical Handicap Discrimination in Employment

Since a large number of individuals in the work force have some type of disability,[243] the state legislature has proscribed handicap discrimination. California's Fair Employment and Housing Act prohibits most employers[244] from discriminating against workers who have a "physical handicap" or "medical condition."[245] When a disabled[246] individual experiences employment discrimination, he or she may also seek federal protection. Federal statutes, however, reach only a limited group of employers and can restrict the litigants' access to the courts. Given these jurisdictional and procedural restraints,[247] the state system

242. The respondent also argued that the Department had the burden and failed to prove that complainant would have been hired into the open mechanic position if respondent had not first rejected him because of his marital status. The Commission rejected this analysis, and chose to follow the federal title VII decisions which held that after unlawful discrimination and entitlement to relief is established, the employer has the burden of demonstrating, by clear and convincing evidence, that notwithstanding the discrimination an independent non-discriminatory factor would have resulted in the rejection of complainant. DFEH v. City of Simi Valley, FEHC Dec. No. 83-21 at 14-16 (citing Day v. Matthews, 530 F.2d 1083 (D.C. Cir. 1976), and Rodriquez v. Taylor, 569 F.2d 1231 (3rd Cir. 1977)). Under this standard, the Commission found that the respondent failed to prove it would have rejected complainant had it considered him.

243. "In 1976, according to data collected by the Bureau of Census . . ., there were 16.6 million adults who reported some level of work disability. This represented 13 percent of our population aged 18 to 64 years." S. REP. No. 316, 96th Cong., 1st Sess. 3 (1979).

244. *See supra* text accompanying notes 28-32.

245. CAL. GOV'T CODE § 12940(a) (West 1980). While the term "physical handicap" has been broadly interpreted, *see infra* note 265 & accompanying text, the statutory provision for "medical condition" has been limited to rehabilitated cancer, *see supra* note 25.

246. Throughout this Article, the authors often choose to use the term "disabled" rather than the word "handicapped." While "handicap" has been used by the legislature and the courts, this term has met with objection from members of the disabled community. *See* Comment, *The Rehabilitation Act of 1973: Who is Handicapped Under Federal Law*, 16 FLA. ST. U.L. REV. 653, 653 n.2 (1982).

247. A complete analysis of all substantive differences between federal and state laws protecting disabled individuals is beyond the scope of this Article. Rather, the Article will

often provides more effective relief for victims of disability discrimination.

Threshold Limitations of the Federal Laws

While title VII prohibits discrimination on the basis of race, sex, and national origin, it does not proscribe handicap discrimination. A separate statute, generally referred to as the Rehabilitation Act of 1973, represents Congress' major attempt to prevent discrimination against disabled individuals.[248] This federal statute may reach employers receiving federal financial assistance, federal contractors, and federal agencies. An analysis of the two provisions that are most frequently relied upon, sections 503 and 504 of the Rehabilitation Act of 1973,[249] shows that the federal legislation has limited application.

Section 503 of the Rehabilitation Act of 1973, which contains a requirement for affirmative action in employment of disabled persons, only covers the conduct of those who have government contracts or subcontracts in excess of $2,500.[250] Consequently, a substantial number of private sector employees cannot rely on this federal statutory provision.

Apart from these jurisdictional limitations, section 503 also presents significant enforcement problems. Unlike California law,[251] the availability of a private right of action under section 503 is highly

focus on major jurisdictional and procedural limitations of the federal system and, in light of the federal restrictions, address the substantive law in California.

248. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 393 (codified as amended at 29 U.S.C. §§ 791-794 (1976 & Supp. V 1981). Other federal remedies for handicap discrimination are available in specific situations. *See, e.g.*, 31 U.S.C. § 1242 (1976 & Supp. V 1981) (prohibiting handicap discrimination by recipients of revenue funds under the State and Local Fiscal Assistance Act of 1972); 38 U.S.C. § 2012 (1976 & Supp. V 1981) (requiring federal contractors to take affirmative action with respect to disabled Vietnam veterans); 20 U.S.C. § 1405 (1976 & Supp. V 1981) (requiring recipients of assistance under the Education of the Handicapped Act to make efforts to employ disabled individuals). A third part of the Rehabilitation Act, § 501, is limited to coverage of federal agencies and departments. 29 U.S.C. § 791(b) (1976 & Supp. V 1981).

249. *See* 29 U.S.C. §§ 791, 793 (1976 & Supp. V 1981).

250. Section 503 of the Rehabilitation Act of 1973 provides in pertinent part:

> Any contract [or subcontract] in excess of $2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals . . . .

Id. § 793(a) (Supp. V 1981).

251. CAL. GOV'T CODE § 12965 (West 1980). *See supra* notes 86-87 & accompanying text.

questionable. The statute does not contain an explicit provision for private suits[252] and appellate courts have refused to imply such a right.[253] Thus, enforcement of section 503 is left to the Office of Federal Contract Compliance Programs (OFCCP), an agency within the Department of Labor.[254]

An assessment of OFCCP's administrative process shows why disabled individuals are hampered by a denial of a private cause of action under section 503. First, while OFCCP has the power to investigate, conciliate, and hold administrative hearings,[255] the major sanctions contained in the administrative regulations involve withholding payments due on a contract or disqualifying the contractor from future government contracts.[256] The administrative process has yielded some back pay awards, but studies show that the vast majority of disability discrimination victims do not receive financial compensation.[257] Other aspects of the OFCCP process can also be burdensome. For example, the agency's lack of resources has led to a large backlog of administrative complaints.[258]

252. Enforcement provisions of the statute only give an aggrieved individual the option to file a complaint with the Department of Labor and merely enable the Department to "take such action thereon as the facts and circumstances warrant . . . ." 29 U.S.C. § 793(b) (1976). Administrative regulations promulgated to enforce the statute only state that the "Director may, within the limitations of applicable law, seek appropriate judicial action to enforce the contractual provisions . . . including appropriate injunctive relief." 41 C.F.R. § 60-741.28(b) (1982).

253. While the United States Supreme Court has not specifically addressed this issue, courts of appeals have found no private right of action. *See, e.g.*, Fisher v. City of Tucson, 663 F.2d 861 (9th Cir. 1981); Davis v. United Air Lines, Inc., 662 F.2d 120 (2nd Cir. 1981); Simpson v. Reynolds Metal Co., 629 F.2d 1226 (7th Cir. 1980); Rogers v. Frito-Lay, Inc., 611 F.2d 1074, 1084-85 (5th Cir.), *cert. denied*, 449 U.S. 889 (1980); Hoopes v. Equifax, Inc., 611 F.2d 134, 135 (6th Cir. 1979).

254. The Rehabilitation Act of 1973 assigns enforcement of section 503 to the Department of Labor. 29 U.S.C. § 793(b) (1976 & Supp. V 1981). *See supra* note 252. As a division of the Department of Labor, the OFCCP has promulgated regulations governing enforcement. *See* 41 C.F.R. § 60-741.1 to -.54 (1982).

255. 41 C.F.R. § 60-741.1 to -.54 (1982). Under its regulations, the OFCCP must first attempt to resolve the case by conciliation. *Id.* § 60-741.28(a). If the conciliation is fruitless, a formal hearing may be held. *Id.* § 60-741.29(a). An individual, however, is not guaranteed this administrative hearing. The Director of the OFCCP has total discretion as to whether the hearing will be granted. *Id.* § 60-741.26(g)(1).

256. *Id.* § 60-741.28(c)-(e).

257. *See, e.g.*, Comment, *Protecting the Handicapped from Employment Discrimination in Private Sector Employment: A Critical Analysis of Section 503 of the Rehabilitation Act of 1973*, 54 TUL. L. REV. 717, 742 (1980). The author states that in fiscal year 1978, OFCCP received 2,700 complaints. Only 120 individuals making these complaints received back pay awards. *Id.*

258. A previous director of OFCCP has stated that the agency had a "large backlog of Section 503 complaints, which the Department of Labor, due to its limited resources, will

Another federal anti-discrimination statute, section 504 of the Rehabilitation Act, also has significant limitations.[259] Apart from its substantive difficulties,[260] this section's usefulness in the employment

not be able to investigate and resolve expeditiously." Affidavit of Weldon J. Rougeau, then Director of the Office of Federal Contract Compliance Programs, Department of Labor, *reprinted in* Appendix to Rogers v. Frito-Lay, Inc., 611 F.2d 1074, 1108-09 (5th Cir.), *cert. denied*, 449 U.S. 889 (1980).

Statistics confirm the delay in processing § 503 complaints. For example, in fiscal year 1980 there was a backlog of over 2,000 unresolved § 503 complaints at OFCCP. Zuckerman, *Handicappers' Rights: Section 503—A Special Kind of Leverage*, 17 TRIAL, Feb. 1981, at 33. During that year only seven percent of the agency's staff time was devoted to complaint investigation. *Id.*

259. Section 504 provides:

> No otherwise qualified handicapped individual in the United States as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. § 794 (Supp. V 1981).

260. Some of § 504's substantive problems are illustrated by Southeastern Community College v. Davis, 442 U.S. 397 (1979), the first United States Supreme Court opinion interpreting that section. In *Davis*, a woman with a hearing impairment was denied admission to a college nursing program. Reversing the court of appeals' finding of discrimination, the Supreme Court's unanimous opinion placed new burdens on § 504 plaintiffs.

Section 504 contains language stating that disabled individuals must be "otherwise qualified" in order to claim discrimination. In *Davis*, the question was whether physical as well as other technical qualifications should be considered. The Supreme Court determined that "[a]n otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap." *Id.* at 406. Thus, the Court refused to restrict its inquiry to only non-physical qualifications and thereby severely limited the type of individual who could invoke § 504's protection.

The second substantive area discussed in *Davis* concerns the duty to accommodate disabled individuals. *Davis* argued that the college could provide personal supervision by an instructor during the clinical program or, in the alternative, the clinical requirement could be waived. The Court determined, however, that section 504 did not require these modifications. It stated that "Section 504 imposes no requirement . . . to lower or to effect substantial modifications of standards to accommodate a handicapped person." *Id.* at 413. While *Davis* did suggest that accommodations might be appropriate in some situations, *id.* at 412-13, the opinion clearly serves to limit what accommodations can be expected.

The *Davis* language has been applied to employment discrimination cases. *See, e.g.*, Simon v. St. Louis County, 656 F.2d 316 (8th Cir. 1981). Some commentaries have suggested ways to narrow *Davis*. *See* Note, *Southeastern Community College v. Davis, Section 504, and Handicapped Rights*, 16 CAL. W.L. REV. 523 (1980); Note, *Accommodating the Handicapped: Rehabilitating Section 504 After Southeastern*, 80 COLUM. L. REV. 171 (1980).

California authority offers a different approach. This is evidenced in the recent Commission decision of DFEH v. City of Anaheim, FEHC Dec. No. 82-08 (1982). There, an individual with multiple disabilities was denied a police dispatcher position. Rather than require a showing that the employee was "otherwise qualified" within the meaning of *Davis*, the Commission articulated a less limiting position on the burden of proof. "A prima facie case is established if the DFEH proves by circumstantial or direct evidence that a complainant was barred from employment on the basis of physical handicap." *Id.* at 5. Unlike in

setting is problematic. Section 504 proscribes handicap discrimination in "any program or activity" receiving federal funds, programs or activities conducted by executive agencies or the United States Postal Service.[261] Thus, by definition, section 504 cannot reach many employers covered by the California statute.[262] Moreover, a number of appellate courts, including the Ninth Circuit, have essentially nullified the application of section 504 in employment cases. These courts have concluded that section 504 does not cover employment discrimination unless "a primary objective of the federal financial assistance is to provide employment."[263] This additional limitation results in little or no protection against employment discrimination that occurs in federally funded programs.

Davis, plaintiff's prima facie case is made upon a showing that he or she could meet the job requirements *except for* limitations imposed by the disability.

After a prima facie case is established, the employer is entitled to raise affirmative defenses or show a non-discriminatory reason for its actions. *Id.* at 6. The Commission's approach allows a litigant to more fully present his or her case and allows the Commission to more appropriately consider the individual's qualifications in the context of the need to accommodate.

For a fuller discussion of California's duty to accommodate, see *infra* text accompanying notes 307-15.

261. 29 U.S.C. § 794 (Supp. V 1981).

262. *See supra* text accompanying notes 28-32.

263. Scanlon v. Atascadero State Hosp., 677 F.2d 1271, 1272 (9th Cir. 1982). The *Scanlon* majority rested their decision on reasoning found in Trageser v. Libbie Rehabilitation Center, Inc., 590 F.2d 87 (4th Cir. 1978), *cert. denied*, 442 U.S. 947 (1979). *Trageser* analyzed a 1978 amendment to the Rehabilitation Act. That amendment afforded § 504 litigants the "remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964." 29 U.S.C. § 794a(a)(2) (Supp. V 1981). The *Trageser* court assumed that title VI only covers situations where the "primary objective of Federal financial assistance is to provide employment," 42 U.S.C. § 2000d-3 (1976), and chose to apply the same restrictive construction to § 504. 590 F.2d at 88-90.

The *Trageser* opinion has been sharply criticized. *See* Scanlon v. Atascadero State Hosp., 677 F.2d 1271, 1272-77 (9th Cir. 1982) (Ferguson, J., dissenting); *see also* Comment, *Employment Discrimination Against the Handicapped: Can Trageser Repeal the Private Right of Action?*, 54 N.Y.U.L. REV. 1173 (1979); Note, *Judicial Limitations on Section 504 of the Rehabilitation Act of 1973*, 26 ST. LOUIS U.L.J. 989 (1982). Nonetheless, *Trageser's* reasoning has been followed by a number of circuits. *See* United States v. Cabrini Medical Center, 639 F.2d 908 (2d Cir. 1981); Carmi v. Metropolitan St. Louis Sewer Dist., 620 F.2d 672 (8th Cir. 1980), *cert. denied*, 449 U.S. 892 (1981). *Cf.* Simpson v. Reynolds Metal Co., 629 F.2d 1226 (7th Cir. 1980) (reasoning of *Trageser* was accepted but holding did not apply because purpose of aid was to provide employment). Two other circuits, however, have refused to adopt the holding in *Traseger*. *See* Le Strange v. Consolidated Rail Corp., 687 F.2d 767 (3d Cir. 1982), *cert. granted*, 51 U.S.L.W. 3611 (U.S. Feb. 22, 1983); Jones v. Metropolitan Atlanta Rapid Transit Auth., 681 F.2d 1376 (11th Cir. 1982). When this Article went to press, an appeal to the United States Supreme Court was pending in *Le Strange*. Thus, the Court may soon settle the apparent split in the circuits.

The Substantive Law in California

In light of the threshold limitations of federal law, a disabled individual often finds that the state system provides his or her only remedy. Even if the litigant is not totally precluded from federal relief, some aspects of California's substantive provisions may be more desirable. While the Fair Employment and Housing Commission has issued a number of precedential decisions on physical handicap cases,[264] there has been a paucity of appellate case law in the area. Two recent California court decisions, however, have clarified major substantive issues.[265] These court decisions, which primarily discuss the statutory definition of physical handicap and defenses to the Act, provide considerable guidance for the California litigant.

Definition of Physical Handicap

Despite the drawbacks of the federal system, individuals have sought relief under the Rehabilitation Act because it contains an expansive statutory definition of the term "physical handicap."[266] Moreover, until recently, the California courts had not discussed the dimensions of the state statutory definition, a provision that, on its face, appeared to be more restrictive than the federal definition. In a recent case, *American National Insurance Co. v. FEHC*,[267] the California Supreme Court established the scope of the state definition. The Court's broad interpretation will undoubtedly aid a number of individuals who are currently seeking relief under the State Act.

264. *See supra* note 77.

265. The two recent decisions are American Nat'l Ins. Co. v. FEHC, 32 Cal. 3d 603, 651 P.2d 1151, 186 Cal. Rptr. 345 (1982), and Sterling Transit Co. v. Fair Employment Practice Comm'n, 121 Cal. App. 3d 791, 175 Cal. Rptr. 548 (1981).

266. Under the Rehabilitation Act, a person is handicapped if he or she: "(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. § 706(7)(B) (Supp. V 1981).

While the statute is broad on its face, its application can be complex. See E. E. Black, Ltd. v. Marshall, 497 F. Supp. 1088 (D. Hawaii 1980), for one court's interpretation of the federal definition. There, the court looked at four factors to determine whether an apprentice carpenter who was denied work because of a back problem could claim protection under the Act. The four factors it used when deciding if the "impairment" constituted a substantial handicap to employment were "(1) the number of jobs from which the disabled individual was disqualified; (2) the types of jobs from which the disabled individual would be disqualified; (3) the geographic area to which the individual had access; and (4) the individual's job expectations and training." *Id.* at 1100-02. Additionally, the United States Supreme Court to some extent has narrowed the statute's application. *See supra* note 260 (discussion of *Southeastern Community College v. Davis*).

267. 32 Cal. 3d 603, 651 P.2d 1151, 186 Cal. Rptr. 345 (1982).

In *American National*, an insurance sales and debit agent named Dale Rivard was fired because of his elevated blood pressure.[268] Mr. Rivard sought relief under the FEHA, asserting that his discharge was an unlawful act of physical handicap discrimination.[269] The California Supreme Court found that high blood pressure is covered under the statutory definition of physical handicap[270] and additionally announced a test for determining what other types of disabilities are covered by the State Act.[271]

The majority opinion, authored by Justice Newman, assessed several statutory provisions. The court looked at Government Code section 12940,[272] a general proscription against unlawful handicap discrimination, and additionally analyzed the more specific definitional section of the statute, codified in Government Code section 12926(h). The critical issue before the court was the meaning of the latter provision, which states:

> "Physical handicap" includes impairment of sight, hearing, or speech, or impairment of physical ability because of amputation or loss of function or coordination, or any other health impairment which requires special education or related services.[273]

The court, broadly interpreting this language, found that the list of disabilities in section 12926(h) is not "exhaustive"[274] and consequently set out a standard for deciding which disabilities are covered. In order to gain statutory protection, an individual must show "1) that the illness

268. *Id.* at 606, 651 P.2d at 1152-53, 186 Cal. Rptr. at 346-47. ("The work of a sales and debit agent is to go door-to-door in a specified residential district selling insurance and collecting premiums. Agents are expected to meet certain sales quotas and to be current in the collection of premiums. The Company regards the work of a sales and debit agent as stressful, and as a matter of policy does not hire persons with elevated blood pressure for that work"). At the hearing, it was established that Mr. Rivard worked as a debit agent for a least two years while suffering from elevated blood pressure. Letter from Deputy Attorney General David S. Chaney to the California Supreme Court (June 14, 1982) (on file at the Dep't of Fair Employment and Housing).

269. At the administrative level, the Commission concluded that Mr. Rivard had suffered from discrimination. It ordered reinstatement with back pay. The company then unsuccessfully sought a writ of review in the superior court. The court found that the commission's findings were supported by the evidence and concluded that high blood pressure is a protected physical handicap under the California Fair Employment Practices Act. American Nat'l Ins. Co. v. FEHC, 32 Cal. 3d at 606, 651 P.2d at 1153, 186 Cal. Rptr. at 347. After the court of appeal ruled on the issue in a depublished opinion, the case came before the California Supreme Court.

270. *Id.* at 608-10, 651 P.2d at 1154-56, 186 Cal. Rptr. at 348-50.

271. *Id.* at 609, 651 P.2d at 1155, 186 Cal. Rptr. at 348.

272. CAL. GOV'T CODE § 12940 (West 1980).

273. *Id.* § 12926(h).

274. American Nat'l Ins. Co. v. FEHC, 32 Cal. 3d at 608-09, 651 P.2d at 1154, 186 Cal. Rptr. at 348.

or defect is physical, and 2) that it is handicapping."[275]

When determining the statutory coverage of physical handicaps, the court noted that "Webster's [Dictionary] tells us that a handicap is 'a disadvantage that makes achievement unusually difficult.' Obviously a condition of the body which has that disabling effect is a physical handicap."[276] Epilepsy, cerebral palsy, arthritis, and high blood pressure are examples of protected disabilities.[277] Also, non-major impairments are covered by the Act.[278] Moreover, the Act's coverage is not limited to those who have present disabilities. An employer's perception or belief that an individual may be disabled in the future is sufficient to trigger the statute's protections.[279]

The *American National* court did place two restrictions on Gov-

275. *Id.* at 609, 651 P.2d at 1155, 186 Cal. Rptr. at 348.

276. *Id.* at 609, 651 P.2d at 1155, 186 Cal. Rptr. at 349. Justice Newman emphasized this point by referring to another definition found in a report of the Advisory Committee for the International Year of Disabled Persons. *Id.* at 609 n.5, 651 P.2d at 1155 n.5, 186 Cal. Rptr. 349 n.5. The report states that *"handicap is a loss or limitation of opportunities to take part in the normal life of the community on an equal level with others."* Report of Advisory Comm. for the Int'l Year of Disabled Persons (Oct. 7, 1981) U.N. Dec. No. A/36/471/ Add. 1, p. 2 (emphasis added by *American National* court).

277. American Nat'l Ins. Co. v. FEHC, 32 Cal. 3d at 609, 651 P.2d at 1155, 186 Cal. Rptr. at 349. The reference to arthritis, a condition which might not be commonly thought of as giving rise to statutory protection, is particularly interesting. This shows the breadth of the statute's application. Additionally, the opinion's reference to Sterling Transit Co. v. Fair Employment Practice Comm'n, 121 Cal. App. 3d 791, 175 Cal. Rptr. 548 (1981) (individual was denied employment because of a low back defect), by implication shows that back injuries are also protected under the Act. *See* 32 Cal. 3d at 610, 651 P.2d at 1155, 186 Cal. Rptr. at 349.

278. American Nat'l Ins. Co. v. FEHC, 32 Cal. 3d at 609, 651 P.2d at 1155, 186 Cal. Rptr. at 348-49.

279. *Id.* at 609-10, 651 P.2d at 1155, 186 Cal. Rptr. at 349. A recurrent issue in physical handicap cases has been whether individuals who are "perceived" or "regarded as" being disabled have statutory protection, regardless of actual disability. *See, e.g.,* DFEH v. Interstate Brands Corp., FEHC Dec. No. 78-05 (1979). The California Supreme Court answered this question in *American National* by concluding that the Act's protection is not limited to those who have present disabilities. It stated that the law "clearly was designed to prevent employers from acting arbitrarily against physical conditions that, whether actually or potentially handicapping, may present no current job disability or job-related health risk." 32 Cal. 3d at 610, 651 P.2d at 1155, 186 Cal. Rptr. at 349. The court also points out the anomaly in granting statutory protection to those who are presently disabled while disallowing jurisdiction over cases where an employer wrongly believes that an employee will not adequately perform in the future. *Id.*

The inappropriateness of other actions by employers was also alluded to in the *American National* case. The court's recitation of some facts from respondent's brief suggests the need to give employees a personal physical examination by a doctor with some specialized knowledge of the alleged disability. The court implied that an employer may not maintain a general policy of excluding individuals who have a certain disability. *Id.* at 607-08, 651 P.2d at 1153-54, 186 Cal. Rptr. at 347-48.

ernment Code section 12926(h). Non-physical handicaps, such as mental or economic disabilities, are excluded from statutory protection.[280] Also excluded are "ills or defects that in fact are not handicapping."[281] The breadth of this latter category must still be explored. While the court listed as examples "certain kinds of digestive, respiratory, or skin disorders,"[282] to the extent that these conditions are handicapping, they are arguably covered under the Act.[283] Moreover, the sweeping language adopted by the majority of the Court[284] suggests that the California statute will provide extensive coverage for disabled employees.

Judicial Interpretation of Employers' Defenses

The scope of employers' permissible defenses under the FEHA has also received judicial interpretation. In *Sterling Transit Co. v. Fair Employment Practice Commission*,[285] the California Court of Appeal focused on three defenses commonly raised by California employers. In

280. American Nat'l Ins. Co. v. FEHC, 32 Cal. 3d at 608, 651 P.2d at 1154, 186 Cal. Rptr. at 348. In footnote 4, Justice Newman suggests that disabled individuals who are not covered under the Fair Employment Practices Act may seek relief under article I, § 8, of the California Constitution. While a complete discussion of Justice Newman's footnote is beyond the scope of this Article, the footnote infers that the constitutional provision grants a broad cause of action for many employment discrimination claims.

281. *Id.* at 608, 651 P.2d at 1154, 186 Cal. Rptr. at 348.

282. *Id.*

283. Relinquishing jurisdiction over all individuals who have digestive, respiratory or skin disorders clearly seems inconsistent with the broad statutory construction contained elsewhere in the *American National* opinion. Since the restriction is designed to exclude conditions "that in fact are not handicapping," its application could be limited to temporary conditions like the common cold.

284. In a lengthy dissent, Justice Mosk, joined by Justice Richardson, sharply criticized the majority opinion. Justice Mosk condemns the majority's definition because "they wrench the terms out of context and look no further than Webster's dictionary." *Id.* at 612, 651 P.2d at 1156, 186 Cal. Rptr. at 350. According to the dissent, an "explicit definition" of physical handicap is contained in California Government Code section 12926(h). *Id.* at 611, 651 P.2d at 1156, 186 Cal. Rptr. at 350. While the statute states that "[p]hysical handicap includes . . .," the dissent did not see these as terms of enlargement. Rather, Justice Mosk found the term "include" was used inconsistently within the statute and thus determined that "no inference can fairly be drawn one way or the other." *Id.*

Justice Mosk also finds that the majority's "sweeping definition violates a number of canons of statutory construction." *Id.* at 612, 651 P.2d at 1157, 186 Cal. Rptr. at 350. In response, he presents a detailed analysis of the statute's language and legislative intent. *Id.* at 612-15, 651 P.2d at 1157-58, 186 Cal. Rptr. at 350-52. Further, the dissent sees principles of liberal construction and public policy as insufficient justifications for the majority's conclusions. *Id.* at 615, 651 P.2d at 1158, 186 Cal. Rptr. at 352. Finally, Justice Mosk extensively discusses the Commission's interpretation of the statute. He charges the Commission with essentially rewriting the statute and strongly disapproves regulations promulgated by the Commission. *Id.* at 615-20, 651 P.2d at 1159-62, 186 Cal. Rptr. at 352-56.

285. 121 Cal. App. 3d 791, 175 Cal. Rptr. 548 (1981).

that case, employee Jose Bustamante worked for Sterling as a temporary truck driver. After doing satisfactory work for nineteen months, Bustamante was offered the same job on a permanent basis. When a physical exam revealed that Bustamante had scoliosis, a lower back problem, he was discharged. The discharge was based on Sterling's blanket policy against hiring anyone with back disabilities.[286]

Since the company conceded that Mr. Bustamante's disability constituted a handicap under the Act,[287] the scope of the statutory definition was not at issue. Rather, Sterling claimed that Mr. Bustamante's disability was a justifiable ground for the termination of his employment. The company maintained that a healthy back is a bona fide occupational qualification (b.f.o.q.) for the job of truck driver.[288] The b.f.o.q. defense, if successful, justifies a refusal to employ all persons who are members of a protected class. This can be done "without inquiry as to whether certain members of the class may, in fact, be capable of safe and efficient job performance."[289]

Because the b.f.o.q. defense can dramatically affect large numbers of individuals, federal title VII cases (albeit not in the area of physical handicap) have chosen to limit the defense's application.[290] The *Sterling* court similarly realized how the b.f.o.q. could have "severe ramifications"[291] and put forth a narrow test for the defense. Under the California Act, an employer may not "exclude a handicapped person

286. *Id.* at 794, 175 Cal. Rptr. at 549.

287. *Id.*

288. Statutory authority for the b.f.o.q. defense is found in CAL. GOV'T CODE § 12940(a)(1) (West 1980).

289. Sterling Transit Co. v. Fair Employment Practice Comm'n, 121 Cal. App. 3d at 796, 175 Cal. Rptr. at 550.

290. *See, e.g.,* Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969). *See generally* B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, SEX DISCRIMINATION AND THE LAW 230-43 (1975).

As was noted in the *Sterling* opinion, the b.f.o.q. defense is not, by statute, available in federal handicap cases. 121 Cal. App. 3d at 796 n.3, 175 Cal. Rptr. at 550 n.3. An analogous federal principle is a "job relatedness" requirement. For an analysis of how both concepts apply to disability discrimination and title VII, see Lang, *Protecting the Handicapped from Employment Discrimination: The Job-Relatedness and Bona Fide Occupational Qualification Doctrines*, 27 DE PAUL L. REV. 989 (1978). In that article, the author summarizes the difference as follows:

> The notion of job-relatedness is thus distinguished from that of the BFOQ in that the former comes into play when selection criteria that are neutral on their face nevertheless operate to exclude members of certain groups, while the latter serves as a justification for the overt exclusion of these groups.

Id. at 990.

291. Sterling Transit Co. v. Fair Employment Practice Comm'n, 121 Cal. App. 3d at 797, 175 Cal. Rptr. at 551.

on the basis of class alone, unless it is proved all, or substantially all, persons in that class are unable to perform the job duties safely and efficiently."[292] While the *Sterling* court noted that common carriers may be subject to a less burdensome standard, the court did not apply one in this case and concluded that the company had failed to establish the b.f.o.q. defense.[293]

A second justification raised by the company was the "safety" defense.[294] The state Act specifically allows disability discrimination when an employee cannot perform his or her duties in a safe manner.[295] "Unlike the b.f.o.q. defense, this [safety] exception must be tailored to the individual characteristics of each applicant . . . in relation

292. *Id.* In adopting this test, the court approved the Commission's regulation which provides, in pertinent part:

> Where an employer or other covered entity has a practice which on its face excludes an entire group of individuals on a basis enumerated in the Act (e.g., all women or all individuals with lower back defects), the employer or other covered entity must prove that the practice is justified because all or substantially all of the excluded individuals are unable to safely and efficiently perform the job in question and because the essence of the business operation would otherwise be undermined.

CAL. ADMIN. CODE tit. 2, R. 7286.7(a) (1982). As has been noted, title VII does not contain provisions on handicap discrimination. *See supra* text accompanying note 6. By announcing its b.f.o.q. test, however, the *Sterling* court also implicitly rejected the company's argument that interpretations of title VII defenses are not applicable to state handicap cases. Compare *Sterling*'s test with language in Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969). In *Weeks*, a sex discrimination case brought under title VII, the court held that an employer must show "that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved." *Id.* at 235.

293. On the common carrier issue, the court stated:

> Sterling points out *Weeks* hypothesized an employer might sustain the burden without showing 'all or substantially all' class members would be unable to safely and efficiently perform the job duties by showing the impossibility or impracticality of dealing with them on an individualized basis, thus allowing it to apply a reasonable general rule. The court in *Harriss v. Pan Am World Airways, Inc.* found such a demonstration. However, *Harriss* involved safety regulations designed to safeguard passengers transported by common carrier and stressed the employer's showing of the increased likelihood of severe harm to its passengers in the absence of its safety policies. Further, a lesser showing is required to justify employment discrimination by common carriers.

Sterling Transit Co. v. Fair Employment Practice Comm'n, 121 Cal. App. 3d at 797, 175 Cal. Rptr. at 551 (citations omitted). The court concluded that "Sterling's evidence does not support extending the lesser alternative standard to other than common carriers." *Id.*

294. *Id.*

295. CAL. GOV'T CODE § 12940(a)(1) (West 1980 & Supp. 1983) provides:

> Nothing in this part shall prohibit an employer from refusing or discharging a physically handicapped employee, or subject an employer to any legal liability resulting from the refusal to hire or to employ or the discharge of a physically handicapped employee, where the employee, because of his or her physical handicap, is unable to perform his or her duties, or cannot perform such duties in a manner

to specific, legitimate job requirements."[296] A question that has been raised in both defenses, however, is whether an employer can speculate concerning an employee's future inability to perform safely.[297]

The *Sterling* opinion clearly limits the b.f.o.q. defense to situations in which "handicapped persons are unable to *presently* safely and efficiently perform the job duties."[298] The court further found the company's "conjecture" on Mr. Bustamante's future inability to perform his duties an insufficient basis for invoking the safety defense.[299] This position has met with approval from the California Supreme Court.[300]

After concluding that the company's safety defense was not meritorious,[301] the *Sterling* court examined one final contention. The company complained of potentially high costs associated with employing disabled individuals.[302] This assertion, sometimes characterized as the

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which would not endanger his or her health or safety or the health and safety of others.

296. Sterling Transit Co. v. Fair Employment Practice Comm'n, 121 Cal. App. 3d at 798, 175 Cal. Rptr. at 551 (citations omitted).

297. The issue of whether future job performance can be considered has been discussed in a number of Commission decisions. *See, e.g.*, DFEH v. Bay Area Rapid Transit Dist., FEHC Dec. No. 80-21 (1980); DFEP v. Ametek, Pac. Extrusion Div., FEHC Dec. No. 80-11 (1980); DFEH v. City of Modesto, FEHC Dec. No. 79-17 (1979); DFEH v. City of Whittier, FEHC Dec. No. 79-15 (1979); DFEH v. Interstate Brands Corp., FEHC Dec. No. 78-05 (1979).

On this issue, the Commission has concluded: "The safety defense concerns present danger to the individual, not speculative or future dangers. Only if there is an identifiable and substantial immediate danger to an individual's health, due to his physical handicap may an employer lawfully refuse to hire him." DFEH v. Bay Area Rapid Transit Dist., FEHC Dec. No. 80-21 at 11 (1980).

298. Sterling Transit Co. v. Fair Employment Practice Comm'n, 121 Cal. App. 3d at 796, 175 Cal. Rptr. at 550 (emphasis in original). Compare the court's statement of facts which emphasizes that Sterling had a policy "against hiring persons with back deficiencies, *even those not presently disabling*." *Id.* at 794, 175 Cal. Rptr. at 549 (emphasis in original).

299. *Id.* at 799, 175 Cal. Rptr. at 552.

300. In American Nat'l Ins. Co. v. Fair Employment & Hous Comm'n, 32 Cal. 3d 603, 651 P.2d 1151, 186 Cal. Rptr. 345 (1982), the court characterized the defense contained in California Government Code § 12940(a)(i) as a "present inability to perform a job efficiently, safely and without danger to health." *Id.* at 609, 651 P.2d at 1155, 186 Cal. Rptr. at 349. Citing *Sterling*, the California Supreme Court found the state act protects individuals who do not present a "current job disability or job-related health risk." *Id.* at 610, 651 P.2d at 1155, 186 Cal. Rptr. at 349.

301. Sterling Transit Co. v. Fair Employment Practice Comm'n, 121 Cal. App. 3d at 799, 175 Cal. Rptr. at 552.

302. The court found that:

> The employer faces possible liability, each time a job injury occurs, for payment of: (1) initial medical treatment, (2) full wages to the end of the current working day, (3) off-time, through workers compensation, (4) a percentage of any permanent disability, (5) rehabilitation in the event of total disabilty, and (6) expenses incurred in replacing the injured employee. . . . We are certain our Legislature was

"business necessity defense," is frequently raised by employers.[303] The court noted that federal agencies have refused to accept high insurance costs as a rationale for discriminatory hiring practices.[304] Further, the court declined what it saw as an invitation to create a non-statutory "financial impact exception."[305] Finally, the court found that the asserted "undetermined future increase" in business costs could not justify a policy of excluding everyone with back irregularities.[306]

Reasonable Accomodation: An Area to be Explored

A major defense that has yet to receive judicial interpretation involves the employer's duty to accommodate disabled employees. Government Code section 12994, as recently amended, implies such a duty. The previous statute provided: "Nothing in this part relating to discrimination in employment shall be construed to require an employer to alter his premises to accommodate employees who have a physical handicap or medical condition, as defined in section 12962, beyond safety requirements applicable to other employees."[307] The amended provision, however, heightens the employer's duty. It states: "Nothing in this part relating to discrimination in employment shall be construed to require an employer to make accommodation for an employee who has a physical handicap that would produce undue hardship to the employer."[308]

To date, the courts have not discussed the meaning of California's accomodation provisions. Similarly, the Commission of Fair Employment and Housing has not issued an opinion that fully explores the extent of an employer's duty to accomodate. Several Commission decisions, however, have touched on what constitutes reasonable accomodation.

In *DFEH v. Bay Area Rapid Transit District (BART)*,[309] an em-

> not unmindful of this issue when it made all exclusionary hiring practices unlawful but those within the stated narrow exceptions specifically relating to job ability and safety.

Id.

303. The Court stated that "[t]hese substantial concerns are mirrored by employers in every jurisdiction mandating equal employment opportunity for the handicapped." *Id.*

304. *Id.* (citing the Office of Federal Contract Compliance Program and the Health Education and Welfare Office for Civil Rights).

305. *Id.* (observing that Wisconsin, a state with similar statutory provisions, has left this task to the legislature).

306. *Id.* at 800, 175 Cal. Rptr. at 552.

307. CAL. GOV'T CODE § 12994 (West 1980).

308. *Id.* § 12994 (West Supp. 1983).

309. FEHC Dec. No. 80-21 (1980).

ployee's prior back surgery was the basis for denying him a utility worker position. When discussing BART's duty to accommodate the complainant's disability, the Commission set out the following standard: "Even had the evidence been found to establish that Pittson was unable to do the full range of duties of a utility worker, our inquiry would not be at an end. Under the interpretation of FEPA's prohibition of physical handicap we have adopted, we would still have to decide whether, with reasonable accommodation, Pittson could perform the essential functions of the job. If so, unless BART could show that the accommodation imposed an undue hardship, the district would still be liable for unlawful discrimination on the basis of physical handicap."[310]

The duty to accommodate was also discussed in *DFEH v. Southern Pacific Transportation Co.*[311] There, the Commission focused on the essential purpose of the job. Complainant Mr. Katzer was prohibited from working as a railroad engineer because he experienced "syncopes," a type of blackout. The Department asserted that Mr. Katzer should have been given a "fireman" position. Concluding that this was an unreasonable accommodation, the Commission stated:

> In any event, the accommodation requested by the Department, that Katzer should have been give a fireman's position, encounters factual difficulties. Southern Pacific's "firemen" are in actuality student engineers or engineer trainees who assist the engineer and on occasion operate the locomotive. Although a syncope on a fireman's part would be less likely to result in extreme harm to health or safety (because the fireman is less likely to be operating the locomotive), the essence of the position is to prepare individuals to work as engineers. The accommodation requested by the Department would require Southern Pacific to alter the essential purpose of the "fireman's" position.[312]

The most recent Commission decision in this area is *DFEH v. City of Anaheim Police Department*.[313] The *Anaheim* case, which involved a person with multiple disabilities, illustrates how the concept of essential

310. *Id.* at 11 (citations omitted). After setting out this standard, the Commission found that BART had not introduced any evidence that established undue hardship. *Id.* at 12. The Commission determined that BART could give Mr. Pittson light-duty job assignments. *Id.* at 7, 11-12.

The *BART* case came before the Commission a second time, on a petition for reconsideration. *Id.* at 1a-8a. The Commission's Order on Reconsideration confirmed the existence of an employer's duty to accomodate, *id.* at 4a-5a, and reaffirmed the viability of modifying the job in question, *id.* at 5a-6a.

311. FEHC Dec. No. 80-33 (1980).

312. *Id.* at 3.

313. FEHC Dec. No. 82-08 (1982).

job functions can be applied. In *Anaheim*, an individual with paralysis of the upper left arm, a fused hip, a colostomy, and a hearing disability was denied employment as a police dispatcher. The Commission determined that some of the disabilities could be accommodated while others could not. Thus, while employee Walker's inability to use both hands meant that he could not change a teletype roll, the testimony of a Lieutenant Molina established "that anyone at the counter could load the teletype and that Mr. Walker could be easily accommodated in this regard."[314] In contrast, there was no duty to accommodate Mr. Walker's hearing disability. The paramount requirement for a dispatcher position is "normal to acute hearing." The Commission concluded that a hearing aid could not help Mr. Walker and found unacceptable the alternative of having another dispatcher repeat the broadcasts that Mr. Walker could not hear. On the latter proposed accommodation, the Commission stated:

> Anaheim has no legal duty to restructure its dispatcher positions so as to have the secondary act as backup to the primary beyond that which is presently the case; that is not the purpose of reasonable accommodation. Rather, reasonable accommodation must enable the handicapped person to perform the essential job functions, not supplant the need for the handicapped person.[315]

Reasonable accommodation is a concept that plays an integral role in many employment discrimination cases. While the full dimensions of an employer's duty to accomodate are unclear, the Commission's opinions represent a step towards defining that duty. Certainly this issue will receive attention in the future. California litigants, therefore, have room to develop meaningful approaches to this area of the law.

California: A Desirable Forum

While there are still a number of issues that have not been resolved by the courts, recent California case law clearly mandates relief for a significant number of disabled individuals who are confronted with employment discrimination. The California judiciary's expansive interpretation of what constitutes a physical handicap and its sensible articulation of defenses to the Act serve as a useful tool for these litigants. Because federal statutory provisions exclude many employees from jurisdictional protection and make enforcement procedures problematic, California may well be the arena where a majority of physical handicap claims are litigated in the future.

314. *Id.* at 7.

315. *Id.* at 11. For the United States Supreme Court's approach to accommodation, see *supra* note 260.

Conclusion

Although the analytical frameworks for California's FEHA and the federal civil rights laws are comparable, statutory differences make the California statute substantially less restrictive and procedurally more accessible to potential plaintiffs. When a person complains of employment discrimination based on physical handicap or marital status, or presents a comparable worth claim, he or she often will find much greater substantive protection under state law. And when a complainant seeks administrative resolution of a discrimination charge, the vastly broader enforcement powers of the California administrative agencies provide a much more effective source of administrative redress.